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SUPREME COURT, U. S.

APPENDIX

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JOHN F. DAVIS,

# Supreme Court of the United States

**OCTOBER TERM, 1967**

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No. 335

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THE HANOVER SHOE, INC.,
*Petitioner,*

*v.*

UNITED SHOE MACHINERY CORPORATION,
*Respondent.*

---

No. 463

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UNITED SHOE MACHINERY CORPORATION,
*Petitioner,*

*v.*

THE HANOVER SHOE, INC.,
*Respondent.*

---

ON WRITS OF CERTIORARI TO THE COURT OF APPEALS FOR THE THIRD CIRCUIT

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Petition for Writs of Certiorari filed
(No. 335—July 7, 1967)
(No. 463—August 7, 1967)

Certiorari granted October 9, 1967

# INDEX


| | PAGE |
|---|---|
| Relevant Docket Entries, United States Court of Appeals for the Third Circuit | 1 |
| Amended Complaint | 5 |
| Second Amended Answer to Amended Complaint | 21 |
| Findings of Fact, Conclusions of Law and Opinion of Sheridan C. J., April 28, 1965 | 27 |
| Notice of Motion dated June 9, 1965 | 108 |
| Affidavit of Ralph M. Carson Read in Support of Motion for Partial New Trial sworn to June 9, 1965 | 111 |
| Annex 1—Transcript of Hearing before Wyzanski J., May 28, 1965 on Application for Construction or Amendment of Decree | 123 |
| Annex 2—Excerpt from Transcript of May 15, 1951 in *U. S.* v. *United Shoe Mach. Corp.* | 152 |
| Supplemental and Amended Findings of Fact, Conclusions of Law and Opinion, as Amended, by Sheridan C. J., August 12, 1965 | 162 |
| Order of Sheridan C. J. August 12, 1965, denying defendant's motion for partial new trial | 179 |
| Judgment of Sheridan C. J., August 13, 1965 | 180 |
| Notice of Appeal dated August 20, 1965 | 181 |
| Notice of Cross-Appeal dated September 10, 1965 | 183 |
| Opinion of United States Court of Appeals for the Third Circuit, April 11, 1967 | 185 |
| Supplemental Opinion of United States Court of Appeals for the Third Circuit, May 18, 1967 | 219 |
| Order Amending Judgment and Amended Judgment dated June 7, 1967 | 223 |
| Order Denying Rehearing dated May 18, 1967 | 227 |

PAGE

Order of the Supreme Court of the United States Allowing Certiorari in No. 335, October 9, 1967 ..... 229

Order of the Supreme Court of the United States Allowing Certiorari in No. 463, October 9, 1967 ..... 230

Complaint in *U. S.* v. *United Shoe Mach. Corp.* ..... 231

Final Decree of Wyzanski J. in *U. S.* v. *United Shoe Mach. Corp.*, February 18, 1953, as modified July 12 and September 17, 1954 ..... 234

Stipulation of Facts dated March 22, 1957 ..... 244

Order of Goodrich J. dated February 12, 1960 Denying Defendant's Motion to Dismiss Following Separate Trial [Opinion at 185 F. Supp. 826] ..... 251

Complaint dated December 30, 1955 in *W. B. Coon Co.* v. *United Shoe Mach. Corp.* Civ. No. 6841, WDNY ..... 252

Decision of Burke J. April 12, 1963, in *W. B. Coon Co.* v. *United Shoe Mach. Corp.* ..... 267

Excerpts from Testimony of Lawrence B. Sheppard ..... 274; 470

Excerpts from Testimony of Paul E. Spears ..... 327; 490; 495

Excerpts from Testimony of Chester Ward ..... 331

Excerpts from Testimony of John J. Corson ..... 345

Excerpts from Testimony of Lewis B. Walker ..... 466

Excerpts from Deposition of Raymond F. Purtell taken June 8 and August 15, 1961 ..... 493

Excerpts from Testimony of Richard M. Cyert ..... 496

Excerpts from Testimony of Robert R. Spence ..... 577

Excerpts from Testimony of Robert M. Laird ..... 588

Excerpts from Separate Trial on the Passing-On Issue 598

Excerpts from Testimony of Lawrence B. Sheppard 598

Excerpts from Testimony of Robert M. Laird ..... 601

PAGE

PLAINTIFF'S EXHIBITS:

Exhibit 24 (Admitted R. 400) ..... 607
Exhibit 25 (Part) (Admitted R. 402) ..... 616
Exhibit 26 (Admitted R. 438) ..... 618
Exhibit 31 (Admitted R. 449) ..... 620
Exhibit 33 (Admitted R. 453) ..... 622
Exhibit 34 (Admitted R. 457) ..... 624

DEFENDANT'S EXHIBITS:

Exhibit 5 (Admitted R. 148) ..... 626
Exhibit 7 (Admitted R. 167) ..... 628
Exhibit 8 (Admitted R. 167) ..... 630
Exhibit 9 (Admitted R. 168) ..... 632
Exhibit 10 (Admitted R. 171) ..... 634
Exhibit 11 (Admitted R. 172) ..... 636
Exhibit 12 (Admitted R. 174) ..... 638
Exhibit 13 (Admitted R. 176) ..... 640
Exhibit 14 (Admitted R. 178) ..... 642
Exhibit 15(A) (Admitted R. 178) ..... 644
Exhibit 15(B) (Admitted R. 178) ..... 646
Exhibit 33, Page 15 (Admitted R. 548) ..... 648
Exhibit 33, Page 22 (Admitted R. 548) ..... 649
Exhibit 34 (Part) (Admitted R. 378) ..... 651
Exhibit 48 (Admitted R. 1367) ..... 664
Exhibit 49 (Admitted R. 1367) ..... 666
Exhibit 51 (Admitted R. 1386) ..... 668
Exhibit 70 (Admitted R. 1884) ..... 670
Exhibit 73 (Admitted R. 1905) ..... 672

## Relevant Docket Entries United States Court of Appeals for the Third Circuit

| Date | |
|---|---|
| **1965** | |
| Sept. 28 | Copy of Notice of Appeal, rec'd. Sept. 13, 1965, filed. |
| | Record and exhibits (except as noted on original list), rec'd. Sept. 20, 1965, filed. (Covers 15626/15627). Exhs. in Exh. Rm. |
| Sept. 28 | Copy of Notice of Appeal, rec'd. Aug. 23, 1965, filed. |
| Oct. 28 | Supplemental record (Order amending opinion), filed. (Covers 15626/15627). |
| **1966** | |
| Apr. 1 | Motion by Defendant for argument before Court en banc and to allow each side 90 minutes for argument, filed. (Covers 15626/15627). Affidavit of services attached. |
| Apr. 11 | Submitted on Motion by United Shoe Machinery Corporation for oral argument before the Court en banc and to allow each side 90 minutes for argument. Coram: McLaughlin, Ganey and Freedman, Circuit Judges. |
| Apr. 11 | Order (*McLaughlin,* Ganey and Freedman, Circuit Judges) denying motion for oral argument before Court en banc and to allow each side 90 minutes for argument, filed. (Covers 15626/15627). |
| May 3 | Argued. Coram: Forman, Ganey and Freedman, Circuit Judges. (Copies of "Dec. 3, 1962 at New York" transcript handed to panel judges in court.) |

1967

Apr. 11 Opinion of the Court (Forman, Ganey and *Freedman,* Circuit Judges), filed. (Covers 15626/15627).

Apr. 26 Petition for rehearing by Hanover Shoe (as appellant in 15627 and as appellee in 15626), filed. (Covers 15626/15627).

May 18 Order (Staley, Chief Judge and McLaughlin, Kalodner, Hastie, Forman, Ganey, Smith, *Freedman and Seitz, Circuit Judges*) denying petition for rehearing, filed. (Covers 15626/15627).

May 18 Opinion Per Curiam on Rehearing (Staley, Chief Judge and McLaughlin, Kalodner, Hastie, Forman, Ganey, Smith, *Freedman* and Seitz, Circuit Judges), filed. (Covers 15626/15627).

May 18 Supplemental Opinion (Forman, Ganey and Freedman, Circuit Judges), filed. (Covers 15626/15627).

May 18 Order Amending Opinion (Forman, Ganey and *Freedman,* Circuit Judges), filed. (Covers 15626/15627).

May 23 Motion by plaintiff (Hanover Shoe, Inc.) for stay of mandate, filed. (4 copies). (Covers 15626/15627). Affidavit of service and acceptance of service attached.

May 29 Order (Forman, Ganey and *Freedman,* Circuit Judges) staying issuance of the mandate until July 10, 1967, filed. (Covers 15626/15627).

June 7 Order (Forman, Ganey and *Freedman*, Circuit Judges) amending judgment, filed. (Covers 15626/15627).

June 7 Amended judgment vacating the judgment of the District Court, filed August 13, 1965 in (United's appeal, No. 15,626) as to damages and a new trial is awarded limited to damages in accordance with the opinion of this Court; the award of counsel fees in the amount of $600,000 for the services of Donovan Leisure Newton & Irvine and $50,000 for the services of Nogi, O'Malley & Harris is vacated for further proceedings in accordance with the opinion of this Court; and vacating the judgment of the District Court, filed August 13, 1965 in (Hanover's appeal, No. 15,627) so that the issue therein raised may be reconsidered as part of the retrial of damages. The amount of attorneys fees in the prosecution, briefing and argument of each of these appeals shall be determined by the District Court as part of the retrial of the issue of damages, and the costs on these appeals shall abide the ultimate decision in this action, filed. (Covers 15262/15627).

July 11 Notice of filing (on July 7, 1967) of petition for writ of certiorari, received from Clerk of Supreme Court, filed. (S. C. No. 335). (Covers 15626/15627).

July 11 Certificate of filing (on July 7, 1967) of petition for writ of certiorari, received from Clerk of Supreme Court, filed. (S. C. No. 335). (Covers 15626/15627).

Aug. 9 Notice of filing (on August 7, 1967) of petition for writ of certiorari, received from Clerk of Supreme Court, filed. (S. C. No. 463, O.T., 1967). (Covers 15626/7).

Oct. 14 Certified copy of order, dated October 9, 1967, received from Clerk of Supreme Court granting petition for writ of certiorari, consolidating this case with S. C. No. 463, allotting 2 hours for oral argument, etc., filed. (S. C. No. 335, O.T. 1967). (Covers 15626/15627).

Oct. 14 Certified copy of order, dated October 9, 1967, received from Clerk of Supreme Court granting petition for writ of certiorari, consolidating this case with S. C. No. 335, allotting 2 hours for oral argument, etc., filed. (S. C. No. 463, O.T. 1967). (Covers 15626/15627).

# District Court of the United States

FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

Civil Action—File No. 5395

THE HANOVER SHOE, INC.,

*Plaintiff,*

*—against—*

UNITED SHOE MACHINERY CORPORATION,

*Defendant.*

## Amended Complaint

*Jurisdiction:*

1. This action arises under Section 2 of the Act commonly known as the Sherman Act, 26 Stat. 209, U. S. C., Title 15, Sec. 2 and under Section 4 of the Act commonly known as the Clayton Act, 38 Stat. 731; U. S. C., Title 15, Section 15.

*Parties:*

2. The plaintiff, The Hanover Shoe, Inc., sometimes referred to hereinafter as Hanover, is a corporation organized and existing under the laws of the State of Pennsylvania and has its principal office and place of business at Hanover, Pennsylvania.

3. The defendant, United Shoe Machinery Corporation, sometimes referred to hereinafter as United, is a corporation organized and existing under the laws of the State

of New Jersey and has its principal office and place of business at 140 Federal Street, Boston, Massachusetts. The defendant also transacts business in the Middle District of Pennsylvania, having a place of business and offices at 20 South Fourth Street, Harrisburg, Pennsylvania, and may be found within said Middle District.

*The Product and Commerce Involved:*

4. Since 1899 United or its predecessor has been continuously engaged in the manufacture and distribution of shoe machinery. The principal part of such shoe machinery is manufactured at United's factory at Beverly, Massachusetts, and is distributed in interstate commerce to shoe manufacturers, including plaintiff. Shipments were made to plaintiff at its principal factory at Hanover, Pennsylvania, and at its other factories at Middletown and Emmitsburg, Maryland, and East Berlin, Pennsylvania.

5. Hanover is now and, since about 1901, has been engaged in the manufacture and sale of men's and boys' shoes. Most of the operations of importance in the making of these shoes are done by machine and Hanover cannot engage competitively in quantity production of such shoes without such shoe machinery.

6. The operations involved in the manufacture of men's and boys' shoes by Hanover and other shoe manufacturers are known as upper cutting, upper fitting, stock fitting, lasting, bottoming, making, finishing and treeing. These operations, briefly described below, are conducted in seven departments or rooms at the shoe factories of Hanover, as follows, and some or all of the United machine types listed

in paragraphs 7 through 13 below have been used by Hanover since 1912.

7. Cutting Room: Upper cutting is done in this room. This consists of cutting the various parts of the shoe upper and linings. The parts of the upper (such as vamps, quarters, tips, back stays and tongues) are usually cut out from leather and fabric by clicking machines and clicking dies. In addition to the shoe uppers, the linings are also cut. Uppers and linings are match-marked, sorted into pairs and stamped for size and case numbers, the latter being for factory identification throughout the remainder of the manufacturing process. The following United machines are now or were in the past used by Hanover in these operations:

Ideal Clicking, Model C
Ideal Twin Clicking, Model G

8. Fitting Room: Upper fitting is done in this room. This immediately follows the cutting operations. It includes a wide range of operations by means of which the separate parts of the upper and lining are prepared and assembled to make the completed shoe upper. The number and sequence of operations vary greatly and are in direct relation to the complexity of design and to the type of shoe being produced. If the shoes are eyeletted, a temporary thread lacing is inserted in the eyelet holes by a lacing machine. This is for the purpose of retaining the shoe shape during the subsequent operations. The following United machines are now or were in the past used by Hanover in these operations:

Edging, Model B
USMC Cementing, Model C

Duplex Eyeletting, Model B
USMC Eyeletting, Model C
USMC Tip Finishing, Model A
USMC Lacing, Model A
Goodyear Outsole Rapid Lockstitch, Model O
Pluma Skiving, Model O
USMC Skiving, Model A
Rapid Folding, Model J

9. Stock Fitting Room: Stock fitting is the preparation of bottom stock for the shoe. The principal shoe parts prepared are outsoles, insoles and platforms (which are cushioned insoles) but they may also include counters, box toes, heels and welting. The operations largely involve cutting and shaping the materials used, and applying adhesives or stiffeners to the various parts. The following United machines are now or were in the past used by Hanover in these operations:

Economy Insole Lip Cementing, Model C
Economy Insole Channeling, Model B
Automatic Heel Compressing, No. 6
Insole Lip Cutting & Scoring, Model E
Improved Gearless Sole Cutting, Model H
Planet Sole Rounding, Model E
Economy Insole Lip Setting, Model B
USMC Splitting, Models B and G
Power Welt Tacking
Insole Rib Cementing, Model A
Insole Rib Reinforcing, Model B

10. Lasting Room: Lasting is the series of operations by means of which the shoe upper and lining are drawn

tightly over the wood last on which the shoe is made, and fastened to the insole of the shoe. This operation causes the upper to conform to the shape of the last, imparting thereby the desired style and fit characteristic to the finished shoe. The work of lasting consists of positioning the insole, upper (including all lining materials), box toes and counters in correct relation to one another; in stretching the upper; and in fastening the entire structure together. The upper must be conformed to the last with a high degree of skill. The following United machines are now or were in the past used by Hanover in these operations:

Rex Assembling, Model H
USMC Celastic Conditioning
USMC Lasting, No. 7
USMC Heel Seat Lasting, Model E
USMC Staple Sidelasting, Model B
Rex Pulling Over, Model C
USMC Insole Tacking, No. 1
USMC Upper Trimming, Model J
USMC Toe Lasting, Model C

11: Goodyear Room: Bottoming and making are done in this room. Bottoming includes a series of operations by means of which the shoe bottom is prepared and the outsole is permanently attached to the lasted upper of the shoe and it may include some operations upon the outsole which are performed after attaching. Construction of the Goodyear Welt shoe requires that the welt be sewn on, the surplus upper material be removed (inseam trimming), the welt be beaten out flat and trimmed off and beveled at the heel breast line, and the outsole and welt be rough-rounded to approximately final shape. The final operation in bot-

toming generally is leveling, which is performed by machines which apply considerable pressure to the sole bottom either by means of a progressive roll or a matrix form. This operation compacts the shoe bottom and produces the desired smooth contours of the sole surface.

Making consists of the operations performed, after the outsole has been attached, that have to do with attaching the heel to the shoe, trimming the heel and the edges of the sole to the required contour, scouring the heels, setting the edges and staining and burnishing the heels.

The following United machines are now or were in the past used by Hanover in these bottoming and making operations:

Goodyear Welt Beating & Slashing
Goodyear Welt Indenting & Burnishing
Inseam Cementing, Model A
USMC Sole Cementing, Model C
Goodyear Universal Rounding & Channeling, Model E
USMC Fibre Fastening, Model B
Goodyear Automatic Sole Leveling, Model D
Goodyear Outsole Rapid Lockstitch, Model O
Loose Nailing, No. 2
Goodyear Stitch Separating, Model B
Goodyear Upper Stapling, Model B
USMC Inseam Trimming, Model C
Goodyear Rapid Bobbin Winding
Goodyear Welt Butting & Tacking, Model B
Goodyear Welt Sewing, Model K
Goodyear Inseam Sewing, Model B
Goodyear Welt Indenting & Burnishing, Model C

12. Finishing Room: Finishing is the giving of a thorough treatment to the entire shoe bottom surface to make it attractive in appearance and the heels (if wood) are permanently attached. The bottom treatment consists of a variable combination of operations according to quality and effects desired and includes buffing and the application of different finishes. The following United machines are now or were in the past used by Hanover in these operations:

McKay Automatic Heel Loading & Attaching, Model B
Crest Heel Blacking, Model C
USMC Jointing, Model G
Twin Edge Setting, Model D
Universal Slugging
USMC Edge Trimming, Model H
Heel Breast Scouring and Aligning, Model A
USMC Edge Trimming, Model L
USMC Twin Edge Setting, Model F

13. Treeing Room: Treeing is the operation in which the shoes are given their final treatment before being packed in boxes. The following United machine is used by Hanover in this operation:

USMC Embossing, Model G

*The Violation of Law Complained of:*

14. Prior to and continuously from the year 1912 the defendant, United Shoe Machinery Corporation, has been violating the antitrust laws of the United States, by:

(a) monopolizing interstate trade and commerce in the shoe machinery industry of the United States;

(b) monopolizing interstate trade and commerce of the United States in substantially all shoe machinery required and used by Hanover in the manufacture of men's and boys' shoes.

15. Monopolization by United as aforesaid and the exercise by it of its monopoly powers has enabled United to dominate and control the market in shoe machinery, to restrict actual competition and to exclude potential competition in said market.

*The Principal Means Used to Accomplish the Violation of Law:*

16. At all times prior to May 17, 1954, the date of the decision of the United States Supreme Court affirming a judgment that United violated Section 2 of the Sherman Act by monopolizing the shoe machinery trade and commerce among the several States, United declined to sell most of its shoe machines and made such machines available to shoe manufacturers only upon leases which reserved to United the sole and exclusive property in the machines and which granted to lessees the right to use the machines only for the purposes specified in the leases. At all times prior to said May 17, 1954, United offered on lease only all of the major, important machines used by Hanover in the operations described in paragraphs 7 through 13 above and listed in those paragraphs.

17. United's leases for most of its machines, including all such leases between United and Hanover, provided for the payment by shoe manufacturing lessees of flat rental charges or of so-called unit charges based upon the number of shoes upon which the machines were used or upon the

number of operations performed by the machines. Leases for the rest of its machines, including all such leases between United and Hanover, provided for the payment of both rental and unit charges. Where unit charge machines were adaptable for more than one kind of operation, separate charges were assessed by United for each kind of operation.

18. At all times prior to said May 17, 1954, all leases of United, including all leases entered into between United and Hanover, included the following provisions which, alone or in combination with one or more of the others, deter and prevent shoe manufacturing lessees, including Hanover, from replacing with a competitive machine each of the shoe machines leased from United.

(a) That the lessee shall use the machine for a fixed period of time, never less than 10 years, subject to renewal for a period of not less than five years; that upon the expiration of the original term or the renewal term, the leases provided that the machinery shall continue under the lease indefinitely subject to the right of United or the lessee to terminate the lease upon 60 days' notice. In practice United did not leave the machinery, subject to termination on 60 days' notice but required the execution of a further renewal lease;

(b) That the lessee of each unit charge machine shall use the machine to its full capacity upon all shoes made by the lessee upon which the machine is capable of being used;

(c) That the lessee of each unit charge machine shall use the machine each month upon a stipulated

minimum number of pairs of shoes, and shall pay to United a stipulated sum of money at the conclusion of each month during which the machine is not used upon said minimum number of pairs of shoes;

(d) That upon termination of the lease the lessee shall surrender the machine to United in good order and condition, shall reimburse United for the cost of all broken or missing parts, and shall pay to United a stipulated sum of money, called a deferred payment or return charge, varying in amount according to the machine leased from about 30% to 40% of the manufacturing cost plus the developmental cost of the machine type, although there is no fixed formula by which the amount is determined.

19. Beginning January 1, 1923, United, by written notice to its lessees established a plan whereby a stated percentage (2% from January 1, 1923, increased to 3% beginning February 1, 1927 and to 4% beginning August 1, 1939) of all unit charges, rentals and minimum charges on a machine were set aside by United to the credit of the lessee solely for the purpose of being applied by the lessee, if the lessee desired, to deferred (or return) payments and, since 1939, to payments for use of the machine less than minimum that might be due or become due under the terms of the lease on that machine or on other machines under lease in the factory. The amount so set aside by United to the credit of the lessee is commonly known as the "right of deduction fund."

20. In the event that any lessee, including Hanover, has desired to return a United machine to be replaced with another United machine, United permits such return upon

payment by the lessee, as required under United's leases, of the cost of transportation of such machine to United at Beverley, Massachusetts, the cost of replacement of all broken or missing parts at the regular prices established by United therefor and the return charge established for such machine in the lease. Where a lessee, including Hanover, wished to return a United machine solely to replace it with a competitor's machine, United permits the return only on the payment, in addition to the items just stated, of an adjustment or commutation of sums that would have accrued thereafter which is calculated, in the case of a machine leased without any unit charge, at 25% of the monthly rentals payable for the balance of the term and, as to a machine leased in whole or in part on the basis of unit charges, at 50% of the minimum monthly payment for the balance of the term after the waiver of four months for each of the remaining years of the term; that these charges are, at the lessee's option, payable in cash or charged against the right of deduction fund.

21. Although not required to do so by its leases, United has at all times undertaken to repair its machines without extra charge to the lessee except for such parts as are required. As a result no independent repair or service organizations have been able to grow up, and potential or existing competitors of United in the manufacture of shoe machinery must either offer repair service with their machines or suffer the competitive disadvantage of marketing machines to shoe manufacturers, all of whom know that repair service will be difficult to provide.

22. As a further means of preventing competition, excluding competitors and expanding its share of the market,

United has, where faced with competition in the marketing of one or more types of shoe machinery made by it, adopted, among others, the following practices:

(a) Reduced its own rates on the machinery type or types threatened by competition;

(b) Introduced new models at lower rates than for comparable old models;

(c) Maintained rates on a particular machine type despite a policy of increasing rates on other machine types to meet increased costs of manufacture;

(d) Introduced new models so designed and priced as to reach only that area of the shoe manufacturing industry in which a competitor is attempting to market a machine.

*Extent of United's Monopoly and Control of Market:*

23. By means of the unlawful conduct hereinbefore described, United has placed in shoe factories most of the shoe machinery used in the manufacture of shoes in the United States. United supplies from 75% to 100% of almost all of the different types of shoe machinery used in the United States, exclusive of dry thread sewing machinery.

24. The following types of shoe machinery (more particulary identified in paragraphs 7 through 13 above) are required by Hanover in the manufacture of men's and boys' shoes and are or have been leased by Hanover from United. United supplied approximately the following percentages of

the total of all such machines in American shoe factories about May 1, 1947:

| Machine Types | United's Share of Total Shoe Machinery in Shoe Factories in the United States as of about May 1, 1947 |
|---|---|
| Clicking | 97% |
| Eyeletting | 81% |
| Cutting Press (Dinking) | 91% |
| Pulling Over | 99% |
| Lasting | |
| Heel Seat Lasting | 99% |
| Staple Side Lasting | 99% |
| Bed Lasting | 99% |
| Welt Toe Lasting | 100% |
| Inseam Trimming | 99% |
| Welt Sewing | 97% |
| Rough Rounding | 98% |
| Outsole Stitching | 92% |
| Loose Nailing | 98% |
| Outsole Leveling | 97% |
| Fibre Fastening | 100% |
| Heel Attaching | 98% |
| Slugging | 91% |
| Fitting Room Department | |
| Skiving | 80% |
| Folding | 62% |
| Upper Cementing | 57% |
| Lacing | 99% |
| Edging | 100% |
| Tip Finishing | 99% |

| Machine Types | United's Share of Total Shoe Machinery in Shoe Factories in the United States as of about May 1, 1947 |
|---|---|
| General Department | |
| Edge Trimming | 88% |
| Edge Setting | 90% |
| Sole Leather Splitting | 82% |
| Cementing | 83% |
| Sole Rounding | 100% |
| Heel Blacking | 100% |
| Jointing | 100% |
| Insole Lip Cutting and Scoring | 97% |
| Goodyear Department | |
| Insole Channeling | 99% |
| Rib Reinforcing | 93% |
| Bobbin Winding | 98% |
| Welt Beating & Slashing | 99% |
| Lip Turning & Setting | 99% |
| Lip Cementing | 99% |
| Welt Butting | 100% |
| Upper Stapling | 98% |
| Rib Cementing | 98% |
| Heeling Department | |
| Heel Compressing | 89% |
| Lasting Department | |
| Insole Tacking | 99% |
| Pulling Over Department | |
| Assembling | 100% |
| Celastic Conditioning | 99% |
| Upper Trimming | 98% |

*Effects of United's Monopoly:*

25. The aforesaid practices and conduct of United, its monopolization of interstate commerce in shoe machinery,

the restriction of existing competition and exclusion of potential competition in the manufacture, leasing and sale of shoe machinery has had the following effects on Hanover:

(a) United has collected from Hanover excessive, arbitrary and non-competitive rental, unit and other charges for its products and services;

(b) Hanover has been prevented from acquiring shoe machinery, new or used, as owner either from United or elsewhere;

(c) United has extracted from Hanover for the use of its shoe machinery, large sums of money in excess of the reasonable value of such machinery and of the service rendered by United on such machinery.

26. As a result of the foregoing monopolization in violation of the antitrust laws and as a result of the acts done in furtherance of such monopolization, Hanover has been damaged in the amount of $1,750,000.

WHEREFORE, plaintiff asks that judgment be entered against the defendant hereinabove named in the amount of $5,250,000, being three times the actual damage suffered by plaintiff and that in addition plaintiff recover a reasonable attorney's fee and costs as provided by statute.

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**Second Amended Answer to Amended Complaint**

DISTRICT COURT OF THE UNITED STATES

FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

[SAME TITLE]

Defendant by its attorneys Davis Polk Wardwell Sunderland & Kiendl for its second amended answer to the amended complaint:

1. Is without knowledge as to the truth of paragraph 5 thereof except that defendant admits that plaintiff is not and was not able to engage competitively in the quantity production of men's and boys' shoes without shoe machinery.

2. Is without knowledge as to the truth of paragraph 6 except it admits (a) that the operations used in the manufacture of men's and boys' shoes are by shoe manufacturers generally grouped under the descriptions in said paragraph and (b) that some or all of the United machine types listed in paragraphs 7 through 13 thereof have been used by Hanover since 1939 at least.

3. Is without knowledge as to the truth of paragraphs 7 to 13 thereof inclusive except it admits (a) that the operations described in those paragraphs are generally performed in the manufacture of shoes and in the departments so designated and (b) that one or more United machines of the types referred to in said paragraphs are now or were in the past leased by Hanover from defendant.

4. Denies paragraphs 14, 15, 22, 23, 25 and 26 thereof.

5. Denies paragraph 16 thereof except it admits (a) that before 1955 it was the practice of defendant to offer for lease only 37 out of the 47 machine types listed in paragraphs 7 to 13 thereof while offering 10 of said 47 machine types either for lease or for purchase at the customer's option and (b) that under its leases the leased machinery remained the sole and exclusive property of the defendant with the right in the lessee to use the same upon the conditions contained in the lease.

6. Denies paragraph 18 thereof except it admits that at all relevant times defendant made with plaintiff and others leases substantially in the form annexed as Exhibit A to defendant's answer dated May 2 1956 to the original complaint and that renewal leases were executed for a five-year term, which terms and conditions have at all times been the same for all lessees of defendant.

7. Denies paragraph 19 thereof except it admits that, beginning January 1 1923, by written notice to its lessees defendant established a plan under which there would be applied by United, unless the lessee elects otherwise, a stated percentage (2% from January 1 1923, increased to 3% beginning February 1 1927 and 4% beginning August 1 1939) of all unit charges, rentals and minimum charges received by defendant in respect of a machine, to liquidation of any deferred (or return) payments for which the lessee became obligated and, since 1939, to the payments for use of the machine less the minimum that might be due or become due under the terms of the lease on that

machine or on other machines under lease in the factory. The amount available for such application on the lessee's election and instructions is commonly known as the "Right of Deduction Fund".

8. Denies paragraph 20 thereof except it admits that at all relevant times it has accepted the return of each machine which a lessee has desired to return even though the contract term of the applicable lease has not expired; that where return before expiration of the contract term of the lease has been desired by the lessee either because the operation performed by the machine is no longer to be used or is to be performed by hand or by another machine of defendant, either newly or previously leased, or because the defendant's machine does not successfully perform the operation which can be successfully performed by a machine of other manufacture or because the lessee is ceasing to do business, in each such case the return has been accepted upon payment by the lessee of the cost of broken and missing parts, the deferred payment, if any, and the cost of transportation to defendant's factory at Beverly, Massachusetts, all as provided in the lease; that where return of the machine before expiration of the contract term of the lease has been desired by the lessee solely for the purpose of substituting in performance of the operation a machine of other manufacture, in each such case the return has been accepted on payment of an additional sum amounting, in the case of a monthly rental machine, to 25% of the monthly rentals for the unexpired term of the lease; or, in the case of a unit charge machine, to 50% of two-thirds of the aggregate minimum monthly charges for the unexpired term of the lease; or, in the case of a machine leased upon monthly rental and unit charge (with

no provision for minimum monthly charges), to 50% of the aggregate monthly rentals for the unexpired term of the leases and that in each such case the lessee was entitled at his election to cause any amount available under the plan known as the Right of Deduction Fund to be applied to discharge in whole or in part the obligation of the lessee to make to the defendant the deferred payment, if any, provided in the lease.

9. Denies paragraph 21 thereof except it admits that defendant has at all relevant times undertaken to repair its machines on lease with plaintiff and with other lessees without extra charge to the lessee except for such parts as are required and in addition to this repair service has rendered planning, shoe-making and other services to plaintiff without charge, all of which services plaintiff has received and accepted and on occasions requested.

10. Denies paragraph 24 thereof except it admits machines of the types listed in paragraphs 7 to 13 thereof are required in plaintiff's manufacture of men's and boys' shoes and are or have been leased by plaintiff from defendant; and admits for the purposes of this case only that the information available to United, known to be incomplete and inaccurate, with respect to use by shoe manufacturers as of about May 1 1947 of machines of the first 17 types listed therein, each first developed, introduced and distributed to shoe manufacturers by defendant and progressively improved by defendant since its introduction, indicates that the percentages therein alleged as being the proportion of all machines then used by shoe manufacturers for the operations performed by such machine types, respectively, represented by machines of defendant's types and

manufacture are approximate within limits rendering inaccuracies probably immaterial for the purposes of this case.

FOR A FIRST DEFENSE

11. Says that plaintiff's claims did not accrue within the time limited for action, and are barred by the Massachusetts one-year statute of limitations governing actions for penalties or forfeitures under penal statutes (Mass. G. L. Ch. 260 § 5) as made applicable to this case by the statutes of Pennsylvania (12 Purdon's Statutes § 39).

FOR A SECOND AND PARTIAL DEFENSE

12. Says that all plaintiff's claims for the period prior to July 1 1939 did not accrue within the time limited for action and are barred by the Pennsylvania six-year statute of limitations.

FOR A THIRD DEFENSE

13. Says that such pre-eminence as defendant has or has had in the shoe machinery industry has been due to its initiative, enterprise, research, experience, knowledge and development of superior products and of business methods adapted to promote entrance into business and competitive success of plaintiff and shoe manufacturers generally, and such pre-eminence has been accompanied by an increase rather than a diminution of competitive opportunity for plaintiff.

FOR A FOURTH DEFENSE

14. Says that the right of action, if any, set forth in the complaint is barred by laches, estoppel, waiver and acquiescence on the part of the plaintiff.

WHEREFORE defendant prays for judgment dismissing the complaint on the merits together with costs and disbursements of this action.

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February 24 1961

## FINDINGS OF FACT, CONCLUSIONS OF LAW AND OPINION

## UNITED STATES DISTRICT COURT

### FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

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[SAME TITLE]

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## I.

### INTRODUCTION

This is a private antitrust action which arises under Section 2 of the Sherman Act, Act of July 2, 1890, c. 647, 26 Stat. 209, as amended, 15 U. S. C. A. § 2, and under Section 4 of the Clayton Act, Act of October 15, 1914, c. 323, 38 Stat. 731, 15 U. S. C. A. § 15, to recover treble damages for defendant's alleged monopolization of the shoe machinery industry, and, particularly, its alleged monopolistic practices with respect to substantially all shoe machinery required and used by plaintiff, The Hanover Shoe, Inc. (Hanover).

The complaint, as amended, alleges in paragraph 14 that "Prior to and continuously from the year 1912 the defendant, United Shoe Machinery Corporation [United], has been violating the antitrust laws of the United States by: (a) monopolizing interstate trade and commerce in the shoe machinery industry of the United States; (b) monopolizing interstate trade and commerce of the United States in "substantially all shoe machinery required and used by Hanover in the manufacture of men's and boys' shoes." In paragraph 15 it is alleged that "Monopoliza-

tion by United as aforesaid and the exercise by it of its monopoly powers has enabled United to dominate and control the market in shoe machinery, to restrict actual competition and to exclude potential competition in said market."

The complaint then sets forth allegations with respect to the principal means used by United to accomplish the violation of law. It is alleged that "At all times prior to May 17, 1954, the date of the decision of the United States Supreme Court affirming a judgment that United violated Section 2 of the Sherman Act by monopolizing the shoe machinery trade and commerce among the several States, United declined to sell most of its shoe machines and made such machines available to shoe manufacturers only upon leases . . ." and that United "offered on lease only all of the major, important machines used by Hanover" in the shoe manufacturing operations described in other paragraphs of the complaint. It is alleged that United's leases for most of its machines, including all such leases with Hanover, provided flat rental charges or unit rental charges based on the number of shoes produced or on the number of operations performed by the machines, and on the rest of its machines, including those on lease to Hanover, provided for payment of both rental and unit charges. It is alleged that in these leases, the 10 year term, full capacity, minimum charge, and machine return clauses, alone or in combination with one or more of the other clauses, deter and prevent shoe manufacturing lessees, including Hanover, from replacing with a competitive machine each of the machines leased from United.

Other means used by United to deter competition are alleged to be the establishment of a "right of deduction fund" whereby a percentage of rentals was set aside by

United to be applied by United, if desired by the lessee, to machine return charges or minimum rental charges; the requirement that lessees pay transportation and parts replacement costs, and a sum equaling either 25 or 50 percent of the remaining rental for the term if a lessee, including Hanover, desired to replace a United machine with that of a United competitor; and United's voluntary assumption of machine repair with no separate charge to the lessee, thereby deterring the establishment and growth of competitive repair service organizations. The complaint alleges that as a further means of preventing competition, United, when faced with competition, reduced its own rates on machinery types threatened by competition; introduced new models at lower rates than those rates for comparable old models; maintained rates on a particular machine type despite a policy of increasing rates on other machine types to meet increased costs of manufacture; and introduced new models so designed and priced as to reach only that area of the shoe manufacturing industry in which a competitor was attempting to market a machine.

Hanover alleges that these practices affected it in the following ways: (a) United collected from Hanover excessive, arbitrary and non-competitive rental, unit and other charges for its products and services; (b) Hanover was prevented from acquiring shoe machinery, new or used, as owner either from United or elsewhere; (c) United extracted from Hanover for the use of its shoe machinery, large sums of money in excess of the reasonable value of such machinery and of the service rendered by United on such machinery.

Hanover claims damages of $2,000,000, and pursuant to the treble damage provisions of the Clayton Act, requests judgment of $6,000,000.

In its answer United denied many of the significant allegations of the complaint and set up as affirmative defenses the statute of limitations, laches, estoppel, waiver and acquiescence on the part of Hanover. United also contends that its pre-eminence in the shoe machinery industry is due to its initiative and enterprise and its business methods, which were adopted to promote success of manufacturers generally, and has been accompanied by an increase of opportunity for Hanover.

The action was tried to the court without a jury.

## II.

## Findings of Fact, Conclusions of Law

A. Background:

Plaintiff, The Hanover Shoe, Inc., is a corporation organized and existing under the laws of the State of Pennsylvania, with its principal office and place of business in Hanover, Pennsylvania.

Defendant, United Shoe Machinery Corporation, is a corporation organized and existing under the laws of the State of New Jersey, with its principal office and place of business in Boston, Massachusetts, and also with offices and a place of business in Harrisburg, Pennsylvania, within this district.

Since 1899 Hanover has engaged in the manufacture of men's shoes by the Goodyear welt process, and until the early 1950's also engaged in the manufacture of boys' shoes by the same process. Except for large quantities of military shoes manufactured during World War II, and for shoes sold to Montgomery Ward and J. C. Penney since World War II, Hanover has sold the shoes it manufactured di-

rectly through retail men's shoe stores operated by its wholly owned subsidiary, Sheppard & Myers, Inc. There are currently about 110 retail stores, Hanover's manufacture of shoes during the period from 1939, the beginning of the complaint period of this action, to 1955, the year in which the action was instituted, ranged in volume from a low of 1,006,768 pairs in 1939 to a high of 1,939,289 pairs in 1944. In 1955 Hanover was one of the 35 largest of approximately 1,000 shoe manufacturers in the United States.

Until 1956 all of the capital stock of Hanover was owned by or for the benefit of H. D. Sheppard or C. N. Myers, the original shareholders, or members of their families, except for small blocks of stock sold to key employees, beginning in 1940. In 1956 approximately 25 percent of the then outstanding capital stock was sold to the public.

United is the successor of a combination of shoe machinery companies which consolidated in 1899. Since that time United has engaged in the manufacture and distribution of shoe machinery. Most of the machinery was manufactured at its factory in Beverly, Massachusetts, and was distributed in interstate commerce to shoe manufacturers, which included machinery supplied to Hanover at its principal plant in Hanover, Pennsylvania, and at its other factories in East Berlin, Pennsylvania, and Middletown and Emmitsburg, Maryland.

Most of the important operations in Hanover's manufacture of shoes are done by machine, and Hanover could not engage competitively in quantity production without the use of shoe machinery.

During the complaint period United made available its more complicated machines to shoe manufacturers, includ-

ing Hanover, on leases only. The more complicated machines are those which have greater importance in the manufacture of shoes. These machines produced the largest revenue for United. In 1951 United had 178 machine types on a lease-only basis. The complaint in this action relates to United's practices with respect to 58 such machine types which Hanover had on lease during the complaint period. The rental for these machines was either a stated amount, a stated amount plus royalties, or royalties only, payable monthly. Of the 58 machine types, 20 accounted for more than 80 percent of the rentals and royalties paid United by Hanover during the complaint period, and 18 of the 20 types were on a royalty or royalty plus rental basis.

United also marketed machines less complicated than the major machines, on an alternate lease or sale basis, at the customer's option. In 1951 United had 122 of these machine types, hereafter referred to as optional machines. The rental for these machines was on a flat rate basis, payable monthly.

In 1951 United had 42 machine types available for purchase only.

All new leases to shoe manufacturers, including Hanover, of machinery involved in this action were for 10 year terms. Renewal leases were for 5 years. From 1922 to May 17, 1954, all of United's leases were substantially uniform. They are known as "Form A" leases. Three clauses important to this action are the full capacity, term, and return charge.[1] A fourth clause, Clause 2, provided, among other

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[1] "Machine Use 5. The leased machinery shall be used for no other purpose than for performing the operations for which it is designed in the manufacture of boots, shoes or other footwear made by or for the lessee. Subject to the foregoing limitations, the lessee shall use the leased machinery to its full capacity upon

things, that the lessee shall at all times and at his own expense keep the machinery in good and efficient working order, and in the event that the lessee shall fail to do so, United may cause the machinery to be put in such order at the expense of the lessee.[2]

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"Full Capacity" all boots, shoes or other footwear or portions thereof made by or for the lessee in the manufacture or preparation of which such machinery is capable of being used, and the provision herein contained shall not be construed to be limited in any way by the number of pairs designated in Column VI in the foregoing Schedule of Machines.

"

. . .

"Term of Lease" 12. The lease hereby granted in respect to each machine hereby leased shall continue, unless sooner terminated by the United Corporation because of breach thereof on the part of the lessee or otherwise as herein provided, for the period of ten years from the date hereof.

. . .

"

. . .

"Return of Machines" 14. Upon the termination in any manner whatever of the lease hereby granted or any extension thereof in respect to any machine hereby leased the lessee shall forthwith deliver such machine to the United Corporation, at Beverly, Massachusetts, complete and in good order and condition, reasonable wear and tear alone excepted, and shall pay to the United Corporation in respect to each such machine the amount (if any) "Payment" set opposite the name thereof in column VII in the foregoing Schedule of Machines. The lessee shall also pay to the United Corporation such sum as may be necessary to cover replacement at the regular prices established by the United Corporation therefor of all broken or missing parts.".

The complaint also sets forth the monthly minimum charge on unit charge machine clause as a means whereby United monopolized the shoe machinery industry to the detriment of lessees, including Hanover. In its brief and proposed findings of fact and conclusions of law, however, Hanover did not point to this clause as a means of monopolization.

[2]It is the conduct of United under this clause, rather than the clause itself, that Judge Wyzanski found to be a means by which United controlled the shoe machinery market.

In 1947 the United States instituted a civil action against United in the United States District Court for the District of Massachusetts, Civil Action No. 7198, alleging violations of Sections 1 and 2 of the Sherman Act, 15 U. S. C. A. §§ 1 and 2. On February 18, 1953, Judge Wyzanski handed down findings of fact, conclusions of law, opinions, and a decree which found that United violated Section 2 of the Sherman Act. United States v. United Shoe Machinery Corporation, D. Mass. 1953, 110 F. Supp. 295. On May 17, 1954, the Supreme Court of the United States affirmed per curiam the judgment of the District Court. 347 U. S. 521. This action will hereinafter be referred to as the Government case.

B. United's Market Position:

As of about May, 1947, United's share of the market of 56 of the 58 lease-only machine types leased by Hanover —there being no data in evidence as to the remaining two— was as follows:

| | | |
|---|---|---|
| 100% | — | 10 types |
| 99% | — | 14 types |
| 98% | — | 7 types |
| 97% | — | 4 types |
| 96% | — | 5 types |
| 90-95% | — | 9 types |
| 85-89% | — | 1 type |
| 80-84% | — | 3 types |
| 55-69% | — | 3 types |
| | | 56 |

Of the 20 major machine types included in the 56, the rentals and royalties of which accounted for more than

80 percent of the charges Hanover paid United, United's market share was:

| | | |
|---|---|---|
| 100% | — | 4 types |
| 99% | — | 6 types |
| 98% | — | 4 types |
| 97% | — | 3 types |
| 89-93% | — | 3 types |
| | | 20 |

There is no evidence that United suffered any appreciable limitation in its share of the market with respect to these machine types prior to the filing of the complaint. With respect to domestic machines, there is no evidence of any change whatever. As to foreign machines, a tabulation for 23 machine types, 15 of which are comparable in function, with United's machines leased by Hanover, shows that 538 machines were installed in factories since January 1, 1947, and 403 of these were outstanding on August 1, 1955. On May 1, 1947, United had 115,787 machines outstanding. Since January 1, 1947, there have been 323 installations of the 15 types Hanover leased from United, of which 104 were clickers. On August 1, 1955, 233 were outstanding, of which 86 were clickers. The influence that these machines had on the dominance of United's position is inconsequential. Until 1955 United enjoyed an overwhelming share of the shoe machinery market which it controlled.

C. The Antitrust Violation:

1. The Findings and Decree in the Government case.

Hanover relies primarily on the decree, findings, conclusions, and opinions in the Government case, as proof of United's illegal monopolization of the shoe machinery in-

dustry in the United States, pursuant to Section 5 of the Clayton Act, 15 U. S. C. A. § 16, which provides:

> "(a) A final judgment or decree heretofore or hereafter rendered in any civil or criminal proceeding brought by or on behalf of the United States under the antitrust laws to the effect that a defendant has violated said laws shall be prima facie evidence against such defendant in any action or proceeding brought by any other party against such defendant under said laws or by the United States under section 15a of this title, as to all matters respecting which said judgment or decree would be an estoppel as between the parties thereto: . . ."

United urges that even with the aid of the decree in the Government case, Hanover has not proved a monopolization; that the four clauses in the Form A lease, the ten year term, the full capacity, the deferred payment or return charge, and the repair clause, were the only factors relied on by Judge Wyzanski as the basis of his decree; that these clauses were not in their actual operation restrictive or monopolizing practices, and had no effect on Hanover; and that all other charges were dismissed with prejudice.

The findings, conclusions and decree in the Government case show that the four clauses of the Form A lease, and also the lease-only system were in their operation restrictive or monopolizing practices.[3]

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[3]The court clearly indicated this in the following parts of its opinion (page numbers refer to 110 F. Supp.).

"The effect of United's leasing system as it works in practice may be examined from the viewpoints of United, of the shoe manufacturers, and of competitors potential or actual. p. 323

"Yet as already noted, a shoe manufacturer may psychologically or economically be more impeded by a leasing than by a selling system.

The court spoke of the lease-only system, and its "features" which have a "special deterrent effect"; the lease-

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And this general observation is buttressed by a study of features in the United leasing system which have a special deterrent effect. Though these features are stated separately, and some of them alone are important impediments, they must be appraised collectively to appreciate the full deterrent effect. p. 324

"However, United's leases, in the context of the present shoe machinery market, have created barriers to the entry by competitors into the shoe machinery field. p. 340

"First, the complex of obligations and rights accruing under United's leasing system in operation deter a shoe manufacturer from disposing of a United machine and acquiring a competitor's machine. He is deterred more than if he owned that same United machine, or if he held it on a short lease carrying simple rental provisions and a reasonable charge for cancellation before the end of the term. The lessee is now held closely to United by the combined effect of the 10 year term, the requirement that if he has work available he must use the machine to full capacity, and by the return charge which can in practice, through the right of deduction fund, be reduced to insignificance if he keeps this and other United machines to the end of the periods for which he leased them. p. 340

"Second, when a lessee desires to replace a United machine, United gives him more favorable terms if the replacement is by another United machine than if it is by a competitive machine. p. 340

"Third, United's practice of offering to repair, without separate charges, its leased machines, has had the effect that there are no independent service organizations to repair complicated machines. In turn, this has had the effect that the manufacturer of a complicated machine must either offer repair service with his machine, or must face the obstacle of marketing his machine to customers who know that repair service will be difficult to provide. p. 340

"If the matter were *res integra*, this Court would adopt the first approach, and, as a preliminary step to ruling upon § 2, would hold that it is a restraint of trade under § 1 for a company having an overwhelming share of the market, to distribute its more important products only by leases which have provisions that go beyond assuring prompt, periodic payments of rentals, which are not terminable cheaply, which involve discrimination against competition, and which combine in one contract the right to use the product and to have it serviced. p. 343

". . . In the relatively static shoe machinery market where there are no sudden changes in the style of machines or in the volume of

only system and the "complex of obligations and rights", accruing thereunder which "in operation" deter a shoe manufacturer from disposing of United's and acquiring a

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demand, United has a network of long-term, complicated leases with over 90% of the shoe factories. These leases assure closer and more frequent contacts between United and its customers than would exist if United were a seller and its customers were buyers. Beyond this general quality, these leases are so drawn and so applied as to strengthen United's powers to exclude competitors. . . . p. 343

". . . These considerations would all affect *potential* competition, and have not been without their effect on *actual* competition. p. 344

"Much of United's market power is traceable to the magnetic ties inherent in its system of leasing, and not selling, its more important machines. The lease-only system of distributing complicated machines has many 'partnership' aspects, and it has exclusionary features such as the 10-year term, the full capacity clause, the return charges, and the failure to segregate service charges from machine charges. Moreover, the leasing system has aided United in maintaining a pricing system which discriminates between machine types. p. 344

". . . the leasing system and the miscellaneous activities just referred to . . . are contracts, arrangements, and policies which, instead of encouraging competition based on pure merit, further the dominance of a particular firm. In this sense, they are unnatural barriers; they unnecessarily exclude actual and potential competition; they restrict a free market. . . . pp. 344-5

". . . United is denied the right to exercise effective control of the market by business policies that are not the inevitable consequences of its capacities or its natural advantages. That those policies are not immoral is irrevelant. . . . p. 345

". . . Defendant intended to engage in the leasing practices and pricing policies which maintained its market power. That is all the intent which the law requires when both the complaint and the judgment rest on a charge of 'monopolizing', not merely 'attempting to monopolize'. Defendant having willed the means, has willed the end. . . . p. 346

" . . . All that this opinion has ruled is that when control of the market has been obtained in large part by such leases, the market power cannot be said to have been thrust upon its holder through its own skill, energy, and initiative, or through technological conditions of production and distribution, or the inevitable characteristics of the market. . . ." p. 346

competitor's machine; the distribution of machines only on leases which "assure closer and more frequent contacts" with customers than if United were a seller, and "beyond this general quality" the four clauses which are "so drawn and applied" as to "exclude competitors" were the business policies with a deterrent effect; the business policies which erected "barriers" to competition and were traceable to the "lease-only system", and its "partnership aspects" and "exclusionary features". The court found that United intended to engage in leasing practices and pricing policies which maintained its market power and in so doing monopolized.

The conclusion is buttressed by the part of the opinion dealing with remedy. In discussing the remedies and their effects, the court clearly indicated that the lease-only system, restrictive clauses and related practices were the policies to be banned.[4]

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[4] "From the opinion on defendant's violations it follows that some form of relief regarding defendant's leases and leasing practices is proper and necessary. p. 348

". . . the Court agrees with the Government that the leases should be purged of their restrictive features. In the decree filed herewith, the term of the lease is shortened, the full capacity clause is eliminated, the discriminatory commutative charges are removed, and United is required to segregate its charges for machines from its charges for repair service. . . . p. 349

"The Court also agrees with the Government that if United chooses to continue to lease any machine type, it must offer that type of machine also for sale. The principal merit of this proposal does not lie in its primary impact, that is, in its effect in widening the choices open to owners of shoe factories. For present purposes it may be assumed that the anti-trust laws are not designed, chiefly, if at all, to give a customer choice as to the selling methods by which his supplier offers that supplier's own products. The merit of the Government's proposal is in its secondary impact. Insofar as United's machines are sold rather than leased, they will ultimately, in many cases, reach a second-hand market. From that market, United will

The decree effectuated the court's intent as expressed in the opinion. After holding that United monopolized the shoe machinery trade and commerce among the several states, in violation of § 2 of the Sherman Act, the court enjoined United from using the lease-only system and purged the leases of the restrictive effects of the four clauses.

If the lease-only system was not a monopolistic practice by the aid of which United maintained its monopolistic position, it would have been unnecessary for the court to order its cessation since it is a practice which could exist independent of the other lease provisions and practices. The complaint in the Government case, the court's summarization of the charges in the complaint, the findings and opinions, and the decree show that the charges which were dismissed with prejudice related to certain charges of monopolizing and attempting to monopolize in certain areas other than shoe machinery.

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face a type of substitute competition which will gradually weaken the prohibited market power which it now exercises. Moreover, from that market, or from United itself, a competitor of United can acquire a United machine in order to study it, to copy its unpatented features, and to experiment with improvements in, or alterations of, the machine. Thus, in another and more direct way, United's market power will be diminished. p. 349

"Furthermore, the creation of a sales market together with the purging of the restrictive features of the leases will, in combination, gradually diminish the magnetic hold now exercised by what United properly describes as the partnership features of the leasing system. As United's relationships with its customers grow feebler, competitors will have an enhanced opportunity to market their wares. p. 350.

". . . It has used its leases to monopolize the shoe machinery market. And if leasing continues without an alternative sales system, United will still be able to monopolize that market. To root out monopolization and to bring United, in the future, in the same class as its competitors, it is necessary not merely to place limitations upon United's leases, but also to require United to offer for sale any machine type which it leases. . . ." p. 350.

United advances several reasons why the four "Form A" clauses had no effect on Hanover.

Full Capacity. One argument is that Judge Wyzanski held this clause to be a "deterrent" to competition on the basis of certain testimony[5] by United's president in which the witness merely adopted that word as used by the court, and to which the court gave unwarranted weight. United offered previous testimony by the same witness in the Government case to show that the witness may have thought that the court was using "deterrent" as applicable to past general practice, particularly since the testimony in the instant case shows that the full capacity clause was never enforced since the early 1940's.

Judge Wyzanski, after reviewing instances when the full capacity clause was invoked, found that this clause and other clauses were invoked in accepting returns of machines before the lease terminated, or in billing lessees for

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[5]"The Court: If I have understood your answer correctly, you said that the full capacity clause operates as a deterrent to a factory taking on a competitor's machine, and it is a deterrent which the factory owner is not always aware of when he signs the lease. Have I misinterpreted your answer?

"The Witness: No, I think that is quite true. Very often they are not fully aware of the full capacity clause, or the way in which the obligation would devolve upon them.

"Q. Well, what I want to make clear is that even in the case where you have done that, have you told him that he couldn't return your machine. A. No, sir. On the contrary, we have gone to great lengths in most instances, and our branches I believe do so in all cases, because he has three alternatives, of course. He may return the machine if he wishes to, upon the basis I have outlined previously. If he wants to retain the machine, then we expect him to live up to the full capacity obligation in the lease; that is, that he will use the machine to full capacity.

"Q. And that is when he has work for it to do? A. That is right. Or if he wishes to use the other machine and not use ours, we expect that payment will still be made to us, of course, under the full capacity clause." (United's Exhibit 107)

machine use, if the lessee desired to use a non-United machine in place of the United machine, whereas these clauses were not invoked if the lessee had some other reason for returning a United machine or for non-use of the United machine. Judge Wyzanski concluded that this "discrimination is designed to operate, and does operate as, a method of excluding from the shoe factories shoe machinery competitive with United." Having so concluded, the court added: "If this were otherwise doubtful, this finding is confirmed by the statement in court of United's president 'that the full capacity clause operates as a deterrent to a factory taking on a competitor's machine.'" Thus, the court reached its conclusion after a review of evidence other than the president's testimony.

Moreover, United's president was advised by counsel that his answers were to apply to the past as well as the present: "And if I ask you questions in the present tense, I also mean them to apply to the general practice in the past tense as long as you have been familiar with the matter, Mr. Brown."

United also argues that the president's adoption of "deterrent" is negatived by a previous question and his answer: "Has it ever been the practice of your company to invoke this full capacity clause to deter or prevent any of your lessees from replacing a machine which you have leased to him with a competitive machine? A. Never." United's president was then asked to explain why the "clause does not have that operation." He answered that a lessee may at any time install a non-United machine if the lessee uses the United machine to full capacity. This explanation is no more than a description of the lessee's rights under the lease. Sanctions under the full capacity clause could not be imposed, no matter what machinery was being

used, if the United machine was being used to full capacity. Thus, any adoption of "deterrent" was not negatived by previous testimony.

United points to the testimony of Messrs. Sheppard of Hanover, Mills of Endicott Johnson Corporation, Erb of Melville Shoe Company, and Jones of Commonwealth Shoe Company that the full capacity clause was never enforced against these companies, and in the case of Mr. Erb, that the existence of the clause did not prevent his company from installing a competitive machine. The relevance of this testimony, for the most part, is not apparent. Judge Wyzanski found that the full capacity clause was not considered by United to have been violated unless the lessee failed to use the machine on work for which the machine was capable of being used, and instead performed such work by using a competitor's machine. Judge Wyzanski said: "In other words, it is not treated as a violation if the lessee fails to use United's machines because he performs the work by hand, or because he discontinues the type of operation for which the machine is capable of being used." The evidence of non-enforcement and that in certain instances shoe manufacturers were not prevented from installing non-United machines would be meaningful if there was also evidence that use of a competitor's machine caused the United machine to be operated at less than full capacity. There was no such evidence.

Finally, United argues that the uncontroverted testimony is that the full capacity clause has not been enforced since the early 1940's. This testimony was given by one of United's employees, who stated that since 1942 no attempt was made to enforce the clause because of the administrative difficulties involved. It is not clear as to whether this was intended to be a "company wide" or "location" aban-

donment of enforcement of the clause. But assuming it was a company wide policy, the full capacity clause was not deleted from the leases, and the company's intention to abandon enforcement was not otherwise communicated to the lessees. In the absence of such communication, the lessee would expect enforcement of the clause.

Return Charge. United relies on testimony by Messrs. Sheppard, Erb, Jones and Mills that the return charge in no way prevented them from returning a United machine, either for replacement by a competitive machine or for any other reason. Mr. Sheppard's testimony dealt with the return of United machines because they were surplus, or in exchange for other or new United machines, and was not concerned with the return of United machines to be replaced by non-United machines. The other three witnesses testified the return charge did not prevent the return of United machines for replacement by non-United machines because they had accumulated substantial credit under United's "Right of Deduction Fund",[6] which would offset machine return charges. This testimony does not overcome Judge Wyzanski's finding that this clause was a deterrent or monopolizing practice. Judge Wyzanski found that the right of deduction fund was an informal policy which United had not expressly committed itself to continue, and that discriminatorily higher charges were assessed if a machine was

[6]The Right of Deduction Fund is a plan, not part of the leases, but established by United in written notices to lessees, whereby (since 1939) 4 percent of all unit charges, rentals, and minimum charges on a machine is credited to the lessee. The credit is solely for the purpose of being applied, if the lessee desires, to deferred (or return) payments, and (since 1939) to payments for use less than minimum, due on that machine or other machines in that factory. The credit is not available if the lessee is in default on any payment due United, or if the lease has been terminated by reason of the lessee's breach or insolvency.

returned, before the end of the term, to be replaced by a non-United machine, as compared with the lower charges assessed if the machine were returned for another reason. It should be noted also that Judge Wyzanski ordered United to discontinue the right of deduction fund and not substitute anything similar in any plan or lease.

Non-Segregated Repair Service Charges. The lease provided that the lessee was to make all repairs at its expense. Instead, United made the repairs at no additional cost. United argues that while Judge Wyzanski found this practice tended to prevent the entry and existence of large-scale independent repair companies and hence put a stumbling block in the way of competing machinery manufacturers, it was a boon for the lessees. United states that Hanover realized it was getting repair service without additional expense, and insisted on efficient service at all times. Judge Wyzanski found United's practice of rendering repair service without separate charge "has brought about a situation" in which there are almost no large-scale independent repair companies. It was not a boon because Hanover paid for it. Judge Wyzanski found that United set monthly and unit charges high enough to pay for the services rendered. Judge Wyzanski pointed out this practice was an advantage to some shoe manufacturers, not because United performed the service when it was not obligated to do so, but because the manner of recovering costs therefor, through inclusion of a factor in machine rentals, worked to the advantage of those manufacturers that had high service requirements to the disadvantage of those that had low service requirements. The repair service clause plus United's conduct was a deterrent. Hanover paid for the service. To have non-United service meant double pay-

ment. Thus, independent service companies did not develop and Hanover was at the mercy of United.

Ten Year Term. United argues that by 1939 its machines had been under lease for more than 27 years, and those prior to 1929 were all on 5 year renewal terms; that the only exception after 1939 would be for new machines installed after that date. The anwer is there were a substantial number either on 10 year terms for new machines, or on terms in excess of 5 years for those whose original term had not expired.

Neither the individual clauses nor the lease-only system can be viewed separately. The evil is the result of their collective use. As Judge Wyzanski said, ". . . some of them alone are important impediments [but] . . . they must be appraised collectively to appreciate the full deterrent effect." Judge Wyzanski found that if shoe machinery were available upon a sale basis, some shoe manufacturers would have been able to provide service at less cost than that charged by United. They would not be subject to the unilateral decision of United whether or not to continue or modify the informal policies by which it administered its leases, thereby releasing shoe manufacturers from some of the psychological and economic power United exercised over them.

In Futuro Argument. United submits that the decree in the Government case was intended to operate prospectively only, citing "may" in listing the effects of the full capacity clause. Judge Wyzanski did not use "may" in describing the effects on the other clauses. He characterized the four clauses as features which "have" a special deterrent effect, and spoke of the deterrent effects of United's policies on the shoe machinery industry.[7] It is clear that he had in

[7]See footnote 3, supra.

mind the effects that the clauses and practices did have, and not merely the effects they might have. This is confirmed by the conclusion that United's practices operated as a method of excluding competitive shoe machinery from the shoe factories, based on findings of such practices in the 90 instances United invoked the full capacity, return, or like provisions of the standard lease during 1927-1948.

In its brief United states, "We are relying upon a unique record of *res judicata* and upon the fact that, as Judge Wyzanski acknowledged, the practices now attacked were in prior cases not only 'uncondemned' but also 'were in part endorsed'."[8] It maintains that its preponderant position, as measured by percentages of machines in shoe factories, is not enough to sustain Hanover's burden of proof of monopoly; that this position is due to its original constitution, which Judge Wyzanski regarded as protected by res judicata, and the superiority of its products; that Judge Wyzanski found the leasing system honestly industrial; and that even the full capacity clause had been approved in a prior case.

The prior Government cases do not bar the holding of monopolization. Judge Wyzanski was aware of them when he framed his findings, opinion and decree. He indicated that but for the prior cases he would have held United in violation of Section 1, as well as Section 2 of the Sherman Act. There is no support for the statement that United's preponderant position is due to its original constitution and product superiority. Judge Wyzanski pointed to these two factors and the leasing system and its aspects as the principal

[8]Three earlier antitrust cases involved United: United States v. Winslow, 1913, 227 U. S. 202; United States v. United Shoe Machinery Company of New Jersey, 1918, 247 U. S. 32; and United Shoe Machinery Corp. v. United States, 1922, 258 U. S. 451.

sources of United's power. In connection with product development, which is closely related to product superiority, Judge Wyzanski found that the rate at which United improved old machine types did not create a formidable record, and United's research in the shoe machinery and in allied developments was neither the basic cause of its success nor far beyond what could be achieved in a monopoly free market. The leasing system and its aspects were the barriers to competition, and were the basis for the decree of monopolization. It is immaterial that Judge Wyzanski said the original constitution was protected by res judicata, and that he did not criticize the other sources of United's power. And while he did say that the leasing system and practices were honestly industrial, he also said that they represent policies which are unnatural barriers to competition, unnecessarily excluding actual and potential competition and restricting a free market.

There is also the contention that Judge Wyzanski's judgment gave effect to what he recognized to be a change in the law beginning with United States v. Aluminum Co. of America, 2 Cir. 1945, 148 F. 2d 416; that while courts can overrule their own decisions and change the law retroactively, they also can limit a precedent reversing decision to prospective application; and that retroactive application of an overruling decision is inequitable and is not invoked when persons have acted in reliance on the prior decision. Assuming that the decision in the Aluminum Co. case represented a change in the law, effective in 1945, Judge Wyzanski did not attempt to limit his decree to the future. Therefore, there is no merit to this argument. See American Amusement Co. v. Ludwig, D. Minn. 1949, 82 F. Supp. 265, 267; United States v. Calamaro, E. D. Pa. 1956, 137 F. Supp. 816, 820, *rev'd on other grounds*, 3 Cir. 1956, 236

F. 2d 182, *aff'd* 1957, 354 U. S. 351. Some of the relief looks to the future, but this does not mean that the court did not find a monopolization, or did not intend its decree to be retroactive. The decree operated both ways. The court required United to cease certain practices and also to terminate outstanding leases.

In summary, the findings, conclusions and decree in the Government case established that United's preponderant position coupled with its lease-only system, the four clauses and its practices with respect thereto constituted a violation of Section 2 of the Sherman Act, and that such policies and practices were restrictive or monopolistic during the complaint period in this action, and had a restrictive effect on Hanover and other shoe manufacturers. With the aid of the decree Hanover has proved a monopolization.

2. The Estoppel Aspects and Relevance of the Government Decree.

The estoppel aspects and relevance of the Government decree have been termed by some courts the "target area." These courts have held that if the decree, fairly construed, does not embrace the plaintiff as a target of the antitrust violation, there can be no recovery. The injury and the damage must not be remote from the violation. A plaintiff "must show that his claimed injury stemmed directly and proximately from the same type of practice condemned in the Government action." International Shoe Machine Corp. v. United Shoe Machinery Corp., 1 Cir. 1963, 315 F. 2d 449, *cert. denied* 1963, 375 U. S. 820. The difficulty does not lie in the principle, but in its application. "It is not possible to formulate any general rule by which to determine what injuries are too remote to bring a plaintiff within the scope of the Act. . . . Each case must be dealt with on its

own facts." Harrison v. Paramount Pictures, Inc., E. D. Pa. 1953, 115 F. Supp. 312, *aff'd per curiam*, 3 Cir. 1954, 211 F. 2d 405.

Prior to the trial, there was a trial on a separate issue in accordance with Fed. R. Civ. P. 42(b), 28 U. S. C. A. The issue was to determine whether excessive shoe machinery costs constituted an injury in that all such costs were passed on by Hanover to its customers. The late Judge Goodrich of the Court of Appeals, sitting as a district judge, found for Hanover. Hanover Shoe, Inc. v. United Shoe Machinery Corp., M. D. Pa. 1960, 185 F. Supp. 826. The Court of Appeals affirmed. 281 F. 2d 481. The order for the separate trial assumed that (1) the violation of law as alleged existed, and (2) the excessive cost of shoe machinery as alleged existed. Judge Goodrich held that "The causal relation between defendant's wrong and plaintiff's harm is obvious."

In La Chapelle v. United Shoe Machinery Corp., D. Mass. 1950, 90 F. Supp. 721, the complaint charged that an inventor was forced to sell his product to United at less than its value because of United's monopoly. The court refused to dismiss the complaint.

> "The more frequent complaint against a monopoly is by one who seeks to buy and complains that since the monopolist controls the market he must therefore buy from the monopolistic seller at the latter's price, or not at all. But the injury is equally great to one who wishes to sell his product in a market subject to monopolistic control and must sell to the monopolist as the only available buyer, again on the monopolist's terms, or not at all. Here the injury is the direct resut of the monopolistic condi-

tion which has been created, and the injured seller may recover under § 15." (90 F. Supp. at p. 723)

After an answer was filed, the court granted defendant's motion for summary judgment because the plaintiff had previously filed a complaint against the defendant alleging the same cause of action, which had been dismissed with prejudice. The reason for the dismissal does not appear. No appeal was prosecuted. Consequently, La Chapelle is still authority for the proposition that the target area is not limited to a monopolist's competitors. See Congress Building Corp. v. Loew's, Inc., 7 Cir. 1957, 246 F. 2d 587; Vines v. General Outdoor Advertising Co., 2 Cir. 1948, 171 F. 2d 487.

In Chattanooga Foundry & Pipe Works v. City of Atlanta, 1906, 203 U. S. 390, plaintiff purchased pipe at an excessive price due to an illegal arrangement between defendant and others. The court held the plaintiff ". . . was injured in its property, at least, if not in its business of furnishing water, by being led to pay more than the worth of the pipe." United attempts to distinguish this case because the excessive price of the pipe represented property diminished by the payment of money wrongfully induced by a conspiracy; whereas, here there is no wrongful inducement because the rentals were paid in accordance with valid leases. In Chattanooga the sale was lawful, but the motives and inducements to make it constituted a wrong, that is, a combination of members of a trust who arranged for the sale at an excessive price after simulated competition which induced the buyer to buy. The court said:

". . . Finally, the fact that the sale was not so connected in its terms with the unlawful combination as to be unlawful, Connolly v. Union Sewer Pipe Co.,

> 184 U. S. 540, in no way contradicts the proposition that the motives and inducements to make it were so affected by the combination as to constitute a wrong. . . ."

United confuses the validity of the leases with the motives and inducements behind them. Hanover was induced to enter into the leases by the absence of suppliers brought about by the monopolistic practices, including the lease-only policy. The motives and inducements were so intertwined with the monopolization practices as to constitute a wrong. Both Atlanta and Hanover were buyers from an antitrust violator. The damages sought in both cases are the higher business costs caused by the wrongdoers. The cases cannot be distinguished.

The cases relied on by United are distinguishable. In Eagle Lion Studios, Inc. v. Loew's, Inc., 2 Cir. 1957, 248 F. 2d 438, *aff'd by an equally divided court,* 1958, 358 U. S. 100, the court interpreted the decree in the Government case as deciding that defendants monopolized only with respect to a segment of the market. They had restricted the films of the major distributors, but not those of the plaintiff and other independent producers. The practices of United were directed at the shoe machinery trade and commerce, and, therefore, at Hanover, a substantial and captive customer. In Conference of Studio Unions v. Loew's, Inc., 9 Cir. 1951, 193 F. 2d 51, *cert. denied,* 1952, 342 U. S. 919, the court held that the injury to plaintiffs, a union and its members, did not flow from the injury to the competitive situation of the motion picture industry caused by the restriction of activities of independent producers by defendants, a rival union and major film producers. The plaintiffs were not in the business of making or exhibiting motion pic-

tures, did not compete with defendants, did not buy from them, and were not even employees of the companies which the defendants intended to destroy. The remoteness of plaintiff's injury was apparent. In Karseal Corp. v. Richfield Oil Corp., 9 Cir. 1955, 221 F. 2d 358, Karseal and Richfield were manufacturers of wax. Richfield applied restraints to capture the independent gas station market. The court held Karseal was in the target area. The fact that Karseal marketed its product through middlemen, while Richfield dealt directly with retailers, was immaterial. The fact pattern for a direct injury was strong in Karseal. The court said: "Assuming Karseal was 'hit' by the effect of the Richfield antitrust violation, was Karseal, 'aimed at' with enough precision to entitle it to maintain a treble damage suit . . .?" Since Karseal was directly in Richfield's aim, the case sheds little light on the standard by which "enough precision" can be measured.

While Eagle Lion Studios, Conference of Studio Unions and Karseal are distinguishable on the facts, under the target area tests suggested by these cases Hanover's injury flows proximately from the monopolization. The complaint in the Government case listed the effects of the monopolistic practices on the shoe manufacturers, as well as on United's competitors. One of the effects on the lessees was United's extraction of large sums of money in excess of the reasonable value of machinery and of the service rendered by United. A similar charge is included in Hanover's complaint. Judge Wyzanski found that United's policies have ". . . not necessarily promoted in the *shoe manufacturing* field the goals of a competitive economy and an open society." He pointed out that if United shoe machinery were available on a sale basis, United's psychological and economic control over shoe manufacturers would be released,

which in turn would cause some shoe manufacturers, for financial and psychological reasons, to be more willing to dispose of United's machines and take on either competitors' machines or United machinery available in a secondhand market. It is obvious that the financial considerations were that some manufacturers would find it less costly to own than to lease machinery. Thus, a charge and finding of detriment to a particular class of persons, as seemingly required by Eagle Lion Studios, is present.

The facts satisfy the test of the Conference of Studio Unions case. Shoe machinery is not absorbed by the general public; it is meant for use solely by shoe manufacturers. They consume all of it, and its cost is a factor in the pricing of shoes. Shoe manufacturers are directly interested in the development of better machinery, and in the quality of existing machinery. It is clear that a shoe manufacturer is ". . . within that area of the economy which is endangered by a breakdown of competitive conditions . . ." in the shoe machinery industry.

The stifling of the business of competing shoe machinery manufacturers was a direct object of United's actions, but it was not the only object. It permitted United to deal with shoe manufacturers on United's terms, and the terms in turn permitted United to stifle the competition. The monopolistic terms, such as the lease-only system and the related clauses and practices, caused both the injury claimed by Hanover and the injury to United's competitors. There is nothing strange about an actor having more than one immediate object of his acts. The aim was wide enough to accomplish both. Hanover was "aimed" at and "hit," the test of Karseal.

United accuses Hanover of an attempt to bring itself within the target area

> ". . . by saying it was obliged to 'obtain its machinery from defendant at a cost in excess of what it would have to pay absent the monopolization' (Pl. br. 9). It tries to use its claim of excessive price to show injury as a result of antitrust violation. So far as the decree is concerned, it is enough here to point out that that claim was dismissed by Judge Wyzanski. Decree par. 2 dismisses with prejudice all other charges of violation than those there enumerated. Among those charges was the charge of excessiveness contained in par. 97 of the Government complaint as follows:".

This argument confuses Hanover's primary and alternate damage claims. Excessiveness relates principally to the alternate damage flowing from the difference between the rent and royalty charges United exacted from lessees when faced with competition and the higher charges exacted when it was not so faced. Hanover's primary claim is measured by the difference between the higher cost of leasing machines and the cost of owning them. The primary claim does not necessarily imply excessive returns to United.

The complaint in the Government case included an allegation that United collected excessive, arbitrary and noncompetitive charges for its products and services and thereby made excessive and unreasonable profits. Judge Wyzanski noted that while United generally followed a policy of setting prices so its shoe machinery business returned income to cover costs plus a profit, there were instances in which the rates were adjusted to meet or defeat competition, and to retain and expand United's share of the market. He found no evidence that United secured a monopoly profit on its entire or machinery branch opera-

tions. He did not make a finding that profits were excessive or unreasonable. While he found that the discriminatory pricing policy was evidence of United's monopoly power, a buttress to it and a cause of its perpetuation, he stated his decree would not deal with the price discrimination aspects of United's policy because some not too rigid price discrimination is inevitable, some is justified as resting on patent monopolies, some is desirable in promoting a competitive market, and an order to eradicate such discrimination could not be enforced.

The doctrine of collateral estoppel by judgment extends only as to those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered. Partmar Corp. v. Paramount Pictures Theatres Corp., 1954, 347 U. S. 89; Emich Motors Corp. v. General Motors Corp., 1951, 340 U. S. 558. The findings and conclusions on the price discrimination aspects of the pricing policy cannot be considered matters upon the determination of which the finding or verdict was rendered in view of the specific language that the decree would not attempt to deal with these matters. Thus, there cannot be an estoppel.

Hanover also relies for its alternate damage on certain documents in evidence in this case. One is a summary of 19 instances in which United reduced rents and royalties on certain machines because of competition. These 19 instances were taken from more than 50 instances in evidence before Judge Wyzanski, and from which he drew for detail analysis in arriving at his findings. Hanover asks this court to infer from the summary and from the evidence of overwhelming market control that, if competition existed, Hanover would have had the benefit of reductions similar to those listed on the summary. Admittedly, few, if any, of the machines on this summary were used by Hanover,

and most of the reductions took place prior to the complaint period in this case. The summary is irrelevant. The inference urged by Hanover cannot be drawn. International Shoe Machine Corp. v. United Shoe Machinery Corp., 315 F. 2d 449, supra. The decree created no estoppel with respect to the findings based on the evidence of 50 instances of reduced rentals, so that the only evidence before this court is the summary of the 19 instances.

Hanover also introduced in evidence a schedule of the percentage of revenues to machine or bulletin costs. The machine or bulletin cost is not the only item considered before a machine rental is set. The development expenses, installation costs, 10 year service costs, and interest on the last two items, are also considered. The rental would include all these, plus a profit, so that the percentage derived from the comparison does not demonstrate a "high rate of return." Moreover, while Hanover points to high percentages it considers "startling," the schedule contains percentages which are extremely low. The schedule also invites other comparisons such as the comparison of revenues with Hanover's computed sales price, also on the schedule, which would reduce the percentages considerably. There is no evidence of the normal rate of return if the omitted cost factors were included. In short, the schedule and related evidence are not sufficiently probative of the alleged high rates of return to United.

Hanover has failed to prove its alternate damage claim. This does not affect its primary claim measured by the difference between the cost to operate its business with lease-only machinery and the cost to own the machinery. The rental returns may not have been excessive, but there is a difference between non-excessive returns and machinery costs in excess of those which would have been incurred had the machinery been purchasable. As stated by Judge

Wyzanski, "Some truth lurks in the cynical remark that not high profits but a quiet life is the chief reward of a monopoly power." Machine rentals which return costs plus a reasonable profit to United may be substantially in excess of the machine costs to a shoe manufacturer dealing in an unrestricted market. A supplier's costs may be inflated due to inefficiency, excess personnel, or other reasons. Such conditions might not exist in a competitive market. There is no necessary inconsistency between a reasonable rate of return and proof that the rentals were substantially in excess of the cost of ownership. If the "quiet life" brought about by the monopolistic practice of United's lease-only system produced some excess costs to Hanover, it need not rely on excess returns to United to show damage. Hanover's claimed primary injury is injury flowing from United's lease-only policy and practices, provided Hanover was at all times ready, willing and able to buy machinery.

Judge Wyzanski did find there was virtually no expressed dissatisfaction from consumers respecting the leasing system; and that all shoe manufacturers who testified on the point expressed a preference for the leasing system. This was not a finding that shoe manufacturers were not hurt by the leasing system. Judge Wyzanski pointed out that "It cannot be said whether this absence of expressed dissatisfaction is due to lack of actual dissatisfaction, to practical men's preference for what they regard as a fair system, even if it should be monopolistic, or to fear, inertia, or reluctance to testify." He then pointed out the system's adverse effects on the goals of a competitive economy and on open society as related to the shoe manufacturing field.

3. Choice of Marketing Methods.

United urges that the language of Judge Wyzanski negates a duty to sell:

> "'The Court also agrees with the Government that if United chooses to continue to lease any machine type, it must offer that type of machine also for sale. The principal merit of this proposal does not lie in its primary impact, that is, in its effect in widening the choices open to owners of shoe factories. *For present purposes it may be assumed that the anti-trust laws are not designed, chiefly, if at all, to give a customer choice as to the selling methods by which his supplier offers that supplier's own products.* The merit of the Government's proposal is in its secondary impact [i.e. creation of a second-hand market]. (Emphasis supplied)'"[9] 110 F. Supp., at 349, 350

Judge Wyzanski found that the lease-only system and lease clauses enabled United to monopolize the shoe machinery market, and to end this monopoly it would be necessary not only to place limitations on United's leases, but also to require United to offer the machines for sale. Thus, United had a duty to refrain from illegal trade practices. See Congress Building Corp. v. Loew's, Inc., 246 F. 2d 587, 594, 596, 597, supra. If one of the practices by which it monopolized the market was its lease-only policy, it had a duty to abandon that policy. The only effective way was by an alternative sales system. The antitrust laws were designed to prevent monopolistic practices. They are not to be thwarted because an incidental effect of the decree may give a customer a choice of the supplier's marketing methods. While ordinarily a supplier may determine his own business practices, they will be condemned as illegal if they

[9]Quotation as it appears in United's brief at page 24. The original opinion did not contain the material in brackets or the emphasis.

are used to achieve a monopoly. "A refusal to sell, while it may be lawful per se, cannot be used in order to achieve an illegal result." United States v. Klearflax Linen Looms, Inc., D. Minn. 1945, 63 F. Supp. 32, 39. It is only another step to say a refusal to sell coupled with a willingness to lease may be lawful, but Judge Wyzanski found these achieved an illegal result:

> "It has used its leases to monopolize the shoe machinery market. And if leasing continues without an alternative sales system United will still be able to monopolize that market. To root out monopolization and to bring United, in the future, in the same class as its competitors, it is necessary not merely to place limitations upon United's leases, but also to require United to offer for sale any machine type which it leases." 110 F. Supp., at 350.

4. The Legality of the Leases.

United relies on the legality of the leases as a complete defense. It cites Bruce's Juices, Inc. v. American Can Co., 1947, 330 U. S. 743, 755; Kelly v. Kosuga, 1959, 358 U. S. 516, 518, 520; Turner Glass Corp. v. Hartford-Empire Co., 7 Cir. 1949, 173 F. 2d 49, 52, for the proposition that since the Form A leases are enforceable as contracts the courts will not sanction a belated antitrust action to avoid legal obligations now completely performed.

Whether the leases are legal is not important in this lawsuit because Hanover is not suing on them. United apparently contends that it would be unjust for Hanover to recover monies which would in effect offset rentals and royalties paid under a valid contract. It would also be unjust to allow a monopolist to escape liability for injury and damage inflicted on another even though the contractual

dealings between them were legal. United's products and services may have been efficient, the prices not excessive, and the leases lawful, but it runs the risk that its monopolistic acts may cause actionable injury. In Chattanooga Foundry & Pipe Works v. City of Atlanta, 203 U. S. 390, at page 397, supra, the court said:

> ". . . In most cases where the result complained of as springing from a tort is a contract, the contract is lawful, and the tort goes only to the motives which led to its being made, as when it is induced by duress or fraud."

The cases cited by United do not support its theory. In Turner Glass Corp. v. Hartford-Empire Co., supra, plaintiff offered no evidence to prove a pecuniary damage by reason of defendant's membership in a conspiracy to monopolize, but contended that the payment of license fees to defendant was evidence of pecuniary damage. Plaintiff admitted that if the license agreements were not inherently illegal, it could not prevail. The court held for defendant because they were not inherently illegal.

Similarly, in Bruce's Juices, Inc. v. American Can Co., supra, in an action for the purchase price of goods, the court refused to allow the defense of illegality of prices, but told the defendant it could prove the illegality in the triple damage action, which was pending.

> ". . . Moreover, if Bruce can in this suit prove that the prices respondent charged were illegal, as it must in order to win, it can do the same in a triple damage suit. . . ." Page 752.

The court simply refused to add another sanction to the antitrust laws.

> "The Act prescribes sanctions, and it does not make uncollectibility of the purchase price one of them. Violation of the Act is made criminal and upon conviction a violator may be fined or imprisoned. 49 Stat. 1528, 15 U. S. C. § 13a. Any person who is injured in his business or property by reason of anything forbidden therein may sue and recover three-fold the damages by him sustained and the costs of suit, including a reasonable attorney's fee. 38 Stat. 731, 15 U. S. C. § 15. This triple damage provision to redress private injury and the criminal proceedings to vindicate the public interest are the only sanctions provided by Congress.
>
> "It is contended that we should act judicially to add a sanction not provided by Congress by declaring the purchase price of goods uncollectible where the vendor has violated the Act. . . ." Page 750.

Then, after suggesting that the argument for the additional sanction might be a persuasive one for Congress, the court said:

> ". . . It is clear Congress intended to use private self-interest as a means of enforcement and to arm injured persons with private means to retribution when it gave to any injured party a private cause of action in which his damages are to be made good threefold, with costs of suit and reasonable attorney's fee." Page 751.

In Kelly v. Kosuga, supra, it is clear that the court decided that the avoidance of private contracts is not to be added to the sanctions provided by the Sherman Act. Implicit in these cases is that the sanctions of the Sherman Act remain

undisturbed. A legal and enforceable contract does not insulate a monopolist from liability to contracting parties.

D. The Injury.

1. Demonstration of Injury.

Hanover relies on Judge Goodrich's opinion in the separate trial of the "passing on" issue to prove injury. United answers that this is erroneous because Judge Goodrich went beyond the two assumptions on which the issue was tried, and made the causal connection himself in order to decide the issue.[10]

Judge Goodrich clearly ruled that on the basis of the assumptions Hanover suffered actual injury. He did not supply assumptions. His ruling shows that if the stipulated assumptions are proved, the other elements, the injury and the causal connection, are present as a matter of law. United misconstrues Judge Goodrich's statement ". . . If there are affirmative defenses or other complicating legal issues, they are not before the Court at this time." The fact of injury is not an affirmative defense, but an essential element of the cause of action, and the "other" issues refer to issues of which he was not aware. He was aware of the need to establish injury.

The hypothesis in the proceeding before Judge Goodrich was broad enough to cover Hanover's primary claim of damages. Judge Goodrich analogized this tort to negligence: ". . . there is (1) a legal duty on defendant's part (to obey the antitrust laws), (2) a violation of that duty, . . ." Similarly, there is a right in Hanover to conduct its

[10]The two assumptions were (1) that the violation of the law as alleged existed, and (2) that the excessive cost of shoe machinery as alleged existed.

business in a market free from the restraints of a monopolist. United's monopolistic practices violated that right. United's violation of that right caused an injury. If Hanover proves the amount of damage, as Judge Goodrich stated, the causal relation between United's wrong and Hanover's harm is obvious. This court fully agrees with Judge Goodrich, and finds that Hanover sustained redressable injury by United's acts. Thus, while United's characterization of the trial of the "passing on" issue as a "mere motion to dismiss" makes no difference with respect to whether this court can and should follow such decision as the law of the case, 1A Moore, Federal Practice, Para. 0.404(4) at page 4213, Para. 0.404(10) (2d ed.); United States v. Wheeler, 3 Cir. 1958, 256 F/2d 745, 747, in view of this court's finding, United's argument with respect to the law of the case need not be fully discussed.

2. The Impact of Monopolization on Hanover.

As a final and complete defense to the antitrust violation United contends Hanover has not shown actual impact of monopolization on it. Some of the reasons advanced are: There was no written purchase policy or expression by the Board of Directors; Hanover bought machines only when it was advantageous to do so; Hanover leased 136 optional machines; Hanover never protested its inability to purchase lease-only machines; the 1955-1956 purchases disprove a purchase policy because important machines were retained on lease, some were replaced by non-United machines, 39 were returned, and in buying Hanover used its credits in the Right of Deduction Fund as part of the purchase price; both foreign and non-United domestic machines were available; Hanover's attitude toward United's leasing policy is the result of a quarrel

between its president and certain United officials; Hanover and its competitors enjoyed equality of treatment since the lease terms were uniform, and, thus, there could not be an injury; and Judge Wyzanski found virtually no shoe manufacturer was dissatisfied with the leasing system.

There was testimony that since the 1920's Hanover was actively engaged in a search to buy non-United Goodyear welt shoe machinery. Mr. Sheppard, president of Hanover, described clicking machines which were purchased to replace United's machines. He told of visits in the 1920's and 1930's to various other welt shoe factories in a search for machines. In the early 1940's Hanover purchased some sole leather dieing out machines to replace their United counterpart. The search for machines was dormant shortly before and during World War II. Whenever shoe makers gathered, there was talk about the purchase of foreign machines after the war ended. Hanover and other shoe factories tested many foreign machines when they became available in 1948 and 1949. The various shoe manufacturers exchanged the test information. The tests and other evidence showed that between 1939 and 1955 only a few non-United machine types, comparable to United lease-only machines, could be used satisfactorily in the Goodyear welt process. Only three such machine types were found and in each case Hanover purchased them.

In 1949 the National Shoe Manufacturers Association (N. S. M. A.), of which Mr. Sheppard was president from 1946 through 1949, and representing 85 to 95 percent of the shoe manufacturing industry, formed a committee, with Mr. Sheppard as a member, to study numerous problems concerning shoe machinery costs, to search for and disseminate information on modern non-United shoe ma-

chinery, to assist members in the evaluation of machinery, and to persuade United to offer more of its machinery for sale.

The absence of a written declaration of a policy to buy machinery, the lack of such an expression in its minutes, and the testimony of Mr. Sheppard that Hanover's policy was to buy machinery only ". . . as far as we could do it advantageously and worth while" are not significant. Hanover was a closely held family corporation. The most important machines were not for sale. Mr. Ray Purtell, employed by Hanover as an assistant superintendent from 1949 to 1956, testified that during his employment the policy of Hanover was to purchase machines, both United and non-United. The policy to purchase only when it was advantageous is merely sound business practice. Hanover need not show that in any and all cases it would have purchased, but that it likely would have purchased the machines. Hanover's purchase of substantially all of United machinery in place at Hanover in 1955-1956 is some indication Hanover would have considered it advantageous to purchase during the lease-only period.

Hanover never asked United if it could buy the lease-only machines. Neither did it protest its inability to buy. Mr. Sheppard testified that any such request would have been a "foolish question." This explanation does not seem unreasonable in view of the findings in the Government case and the evidence in this case. Not only Mr. Sheppard, but representatives of the whole shoe machinery industry apparently thought that they were captive customers of United. In a proposed statement by the technical committee of the N. S. M. A. to United protesting increases in unit charge rates in 1950, the committee requested that it be con-

sulted about rate increases particularly ". . . since the only choice a shoe manufacturer has is to pay the increases or stop making shoes."

Mr. Sheppard was interviewed by representatives of United prior to the Government case. The purpose of the interview was not to obtain Hanover's complaints against United, but to obtain Mr. Sheppard as a witness for United in the Government case. He was asked whether he had any objections to the leasing system, but he was not asked whether he would prefer to buy rather than lease. The leasing system had many facets of which lease-only was one. In view of the shoe machinery market, a reasonable interpretation of the question is whether there was any objection to the leasing system as it existed. In the interview he mentioned an incident when he refused to lease clicking machines because United insisted that Hanover acknowledge in the lease that United owned the machine dies which Hanover had purchased. Before the matter could be resolved. Hanover purchased 11 Reece clicking machines. Mr. Sheppard described the rejection of the United machines as brazen and "perhaps stupid," because the Reece machines were unsatisfactory and later abandoned with a return to United machines. This one instance does not support an inference that Hanover would have purchased machines only when the lease terms were unacceptable.

Optional Machines. During the complaint period Hanover leased 136 optional machines. The optional machines were the minor, simpler, less complex machines. Some were not purchased because the price was too high. During the same period Hanover purchased non-United machinery, exclusive of dry thread sewing machines, for prices totalling about $335,000. This was almost four times the rentals of

both United and non-United machinery it could have purchased during the same period. In addition, Hanover purchased United optional machinery totalling about $29,600. The rentals for non-United machinery totalled about $101,100, of which about $76,900 was for lease-only. Total rents and royalties paid United were about $2,417,700, but only about $64,700 or 2.68 percent was for optional machines.

The effect of optional machine rentals, which were flat rate, could be minimized through efficiency and quantity production, and this would offer less incentive for ownership than in the case of lease-only machines. The latter, with few exceptions, were offered only on a royalty or rental and royalty basis. The leasing of some optional machinery because the purchase price was too high, the substantial purchases of machinery from non-United sources, the low percentage of optional rentals to rental and royalty expense, and cost savings which could be achieved through efficient use of optional machines point to a Hanover purchasing policy, rather than to a leasing policy.

The 1955-56 Purchases. Pursuant to order of the district court in the Government case, a plan for the termination of all outstanding Form A leases became effective on June 1, 1955. All lessees were given the option to terminate their leases, and to purchase the machines at prices computed in a discount schedule set out in the plan. In October, 1955, Hanover purchased 205 of the 306 machines it then held on Form A leases, deferring action on the remaining machines for various reasons. By December, 1956, Hanover had purchased an additional 7 machine types, consisting of 58 machines, and it returned 37 machines to United. The total cost of the machines purchased by Hanover in 1955 and 1956 was about $613,900. In 1960 two additional machines were purchased, three were returned and one remained on lease. Also, in 1955 when United offered

its lessees the option to service their own machinery, with a credit of 13.3 percent against lease charges, Hanover chose to do so.. These purchases show a disposition by Hanover to buy if it could do so advantageously. It is true that the prices were at discounts and the result of negotiations, and that Hanover postponed for one year a decision to buy about $100,000 worth of machinery. United says the prices were bargains; at the time the N.S.M.A. said they were too high. The 1955 prices were the product of extended discussions in which factors such as age, obsolescence, etc., were applied. Even if the prices were bargains, it does not follow that Hanover would not have bought at higher prices. There is no evidence that Hanover refused to buy unless prices were a bargain. Also, the evidence is that Hanover retained the $100,000 worth of machines on lease, not because it preferred leasing, but because certain newly developed United and non-United machines were about to be marketed which might make those machines obsolete. Most of these were subsequently purchased. Hanover weighed many factors, such as price, the years required for a return of the investment, etc., before it decided to purchase. This was sound business judgment. Undoubtedly, these same factors would have been considered in 1939 and subsequent years. This does not justify an inference Hanover would not have bought during the complaint period. It authorized the purchase of machines of $500,000 from United and $250,000 from non-United sources. The few instances pressed by United to support a contrary inference are not convincing.

In its brief United states that Hanover did not buy important machine types such as heel seat lasters, toe lasters, and Goodyear stitchers, but retained them on lease. This was the testimony of Mr. Ray Purtell who had not been

employed by Hanover since 1956, and who testified "to the best of my memory." The credible evidence shows, however, that Hanover purchased four heel seat lasters and 14 toe lasters in the first group of purchases in 1955, and that none remained on lease. Also, 17 Goodyear stitchers were included in the first group of purchases, and of the two retained on lease, one was only a spare or standby machine and the other was eventually replaced by a foreign machine.

United also states that after completion of the 1955-1956 purchases, Hanover continued three machines on Form A leases until their return in 1960. The testimony in support of this statement is somewhat ambiguous, and the record otherwise shows the machines were retained on the Form B lease.[11] One was a machine type of which Hanover purchased nine, indicating that this may have been an excess machine. Another was a machine type of which Hanover purchased two, and the evidence is that the returned machine was a new machine originally listed for purchase. The third was the spare or standby Goodyear stitcher. Hanover also converted to Form B leases certain machinery considered for purchase in 1955. Except for the Goodyear stitcher, these machines were later either returned or purchased.

Hanover replaced certain United machines with non-United machines. These instances were few, but together with Hanover's contemplated expenditure of $250,000 on non-United machines and its action in waiting for the development of non-United machinery indicates that Hanover did not prefer to lease United machinery. Hanover's

[11]The Form B leases were the new leases approved as part of the plan to terminate Form A leases. The objectionable features of the Form A lease were eliminated.

disposition to buy. United machinery may be inferred from both non-United and United machinery purchases in 1955-1956, particularly if acceptable non-United machinery was not available prior to that time.

The return of 39 machines at the time of and following the 1955-1956 purchase demonstrates only the unlikelihood of the purchase of those machines, but not the other machines. They were only a small part of the machines evaluated for purchase. Some were optional which never entered into the damage calculation. Hanover eliminated rental costs from the remainder so that only relevant royalty costs remain in the damage calculation.

Availability of Domestic Non-United Machines. There is little evidence that major comparable non-United machines for use in the Goodyear welt process were available from United States manufacturers. Mr. Swinney, a retired employee of and consultant to Genesco, a shoe manufacturer, testified that in 1949 he had seen a Hamlin heel and toe bed laster in the Hamlin Shoe Co. in Massachusetts, and in 1920 he had seen a R. H. Long lockstitch machine in the Rice and Hutchins factory in Massachusetts. While these machines performed the same function as their United counterparts, he did not testify that their performance and capacity compared with United machines. He identified some 15-20 other domestic machines, whose functions were similar to certain United machines. He only mentioned two that were of comparable quality. One, the Prime Manufacturing Rib Reinforcing Machine, was purchased by him in 1949 when he bought three for a total of $125.00. It is not likely this was comparable because the 1955 price of one such United machine was $4,825.00. The other, a Peerless Machine

Works Eyeletting Machine, was purchased by him in 1949; but there is no indication as to how long the machine had been available for purchase. Neither machine was one of the eight key machine types used in the Goodyear welt process: Pulling Over, Staple Side Lasting, Toe Lasting, Heel Seat Lasting, Inseaming or Welting, Inseam Trimming, Rough Rounding, and Lockstitching. Moreover, although Mr. Swinney had been associated with the shoe business for many years, most of his observations were limited to the years 1949-1950.

While Hanover purchased three LeMatic Sole Press machines and ten Schwabe Clickers in 1951 and subsequent years, there is no evidence of how long these had been available prior to 1951. The only machine which appears to have been available prior to and since is the Landis stitcher which, while primarily intended for use by the shoe repairing industry, was also used satisfactorily in welt shoe manufacture.

Availability of Foreign Machine. The principal testimony was given by Mr. Swinney and Mr. Major, also an employee of Genesco, Mr. Walker, an official of United, and Mr. Becka, general manager of the International Shoe Machinery Company. In 1950 both Mr. Swinney and Mr. Major were connected with the establishment in Israel of a shoe factory in which Genesco had an interest. The following is a summary of their testimony, together with comment.

Mr. Swinney. The Goodyear welt machines used in the Israeli factory had been obtained in England from Standard Engineering Company, a British manufacturer. They performed the same function as United machines. Most of his observations were limited to machinery he saw in operation in 1949 in connection with the procurement of ma-

chinery for the Israeli factory. He identified about 70 foreign machines of various types and manufacture which he had seen in operation. He did not testify that any of these machines were in operation in the United States between 1939-1955. There were seven machines of different types which he considered comparable to United machines. Six of these were Standard. There was no evidence that they were available before 1949-1950. Only two were in the key category. One was a Standard Oscillating Welt Wheeling Machine No. 93, "Very similar in quality and quantity of production" when compared with the United machine, called Goodyear Welt Indenting and Burnishing. The capacity of the Standard machine was 700-800 pairs of shoes per day, and two different United machines of that type had a capacity of 1800 pairs per day. The other was the Standard Heel Seat Lasting machine, on which he expressed no opinion on comparableness. According to the catalog, capacity of the comparable United machine exceeded the Standard by 300 to 400 pairs per day.

Although for a long time Genesco had much information on foreign machines, and had tried them, it used only United machines in its Goodyear welt factories in the United States. It procured none of the Goodyear welt machine types used in Israel for its United States factories. He remembered seeing only one foreign machine in any domestic Genesco factory, an Albeko Band Knife Splitter, which was a machine type also purchased in 1953 by Hanover.

Mr. Major. Mr. Major's testimony was similar to that of Mr. Swinney.

Mr. Walker. While he was manager of United's Milwaukee territory in the 1930's he saw five foreign machines

of the key type installed in domestic shoe factories: a Moenus Staple Side Laster, Heel Seal Laster Pulling Over, Welter and Stitcher and a Standard Welter. These machines "did a passable job; I don't think any machines are necessarily comparable to the performance of United machines." Most of the machines were not even rated as passable on United's Outside Machine Reports (O. M. Rs.), prepared by him or under his direction, and on other United documents prepared at the time he saw the machines. The Moenus welter was not used at all during a particular week because a German mechanic was working on it, and the operator was having considerable trouble with it. Later the machine was removed as unsatisfactory, and replaced by a United machine. Subsequent reports indicated that the seller was having trouble placing the machine in another factory for trial. The Standard Welter, installed in the same factory, was removed in 1937 as a "total failure." The only machine type other than key machine types was a Montreal or a Moenus sole layer which he also rated as passable.

Some foreign machines were described on O. M. Rs. as "man killer," "unsatisfactory," and "total failure." He attempted to explain these ratings by stating that he thought that the factories were not interested in making the machines run, and it was not his job to encourage or make it possible to make the machines a success. He thought the machines could have performed satisfactorily.

The explanation is not convincing. It is unlikely that a concern would obtain a machine on a trial basis, and have its organization disrupted in an attempt to operate it, if it was not interested in seeing it run. Whether Mr. Walker was not interested in seeing it run, or in not encouraging its

success, is immaterial. He was an outsider in no way connected with the potential seller or buyer. No one would expect him to breach his loyalty to his employer by encouraging or aiding in the success of a competitor's machines. One would expect him to be factual in his reports to his employer. If a machine was not unsatisfactory, an unqualified rating to that effect would be of little value to United.

Mr. Becka. For a long time he had been familiar with foreign shoe machinery and with United machinery, since ". . . United machines were practically the only machines . . .". In 1954 he made a trip to Europe to examine shoe machinery. Five machine types—heel seat lasters, stitchers, rough rounders, stapleside lasters and pulling over machines—were ". . . equally as good and suitable for use in Canadian or American shoe factories." Foreign machines brought here must be modified for such things as the particular way they are to perform, electrical requirements, custom installation, and the like. A shoe manufacturer could not very well modify the machines unless it also went into the shoe machinery business. Two American shoe manufacturers had equipped their factories with machinery other than United, but both had machine shops equipped for the manufacture of machinery. In the distribution of foreign machines, the spare parts, service, and technical know-how are of major importance, and a shoe manufacturer could not acquire foreign machines without an assurance of a local supply of parts and availability of local service. There were only four organizations which offered this service. He knew of only a few Goodyear welt foreign machines in place in United States shoe factories prior to 1955.

Mr. Becka's observations were limited to about one year prior to the complaint period, and are at variance to

data and reports accumulated by United. And there is no evidence that Hanover had facilities for the manufacture of shoe machinery. It is not necessary to detail Mr. Becka's testimony of the four shoe organizations. It is sufficient to say that none would have been adequate if Hanover had purchased foreign machinery.

There is other evidence of the non-availability of acceptable foreign machinery. Mr. Sheppard testified that Hanover would not purchase machines that would not do the work of United machinery because of Hanover's policy of high quality performance and production. He testified that whenever foreign machines suitable to Hanover's needs were found, they were purchased and substituted for United machines. Also, in the Government case United requested the court to find as a fact that as of 1952

> ". . . The evidence is clear that shoe manufacturing practices in Great Britain and continental European countries vary markedly from those of the industry of this country; that the productivity of such foreign factories is universally below that of American factories; that the high production of the American industry is not a requirement of these foreign industries; and that machine and operating characteristics acceptable abroad are not acceptable to the industry of the United States. The main reason for the production superiority of the shoe industry of this country lies in the machinery developed and introduced by United. . . ."

In a communication, dated July 7, 1952, United recognized that ". . . The war brought about a cessation of activities, not only of those [European shoe machinery]

companies, but of our own foreign companies to a considerable extent, and in some instances the plants of foreign shoe machinery manufacturers were damaged." The communication also noted that of late, foreign manufacturers had recovered from the effects of the war and were making efforts to introduce their machinery into the United States, indicating United's awareness of the absence of foreign machines during the period from the war to 1952. Such foreign machines were described as copies of United's older existing models, and while many were listed as good machines, the communication stated that this rating was ". . . . based on performanee under European conditions where the requirements are normally much different from those existing in this country, . . .", and that United machinery ". . . can deliver superior performance under the conditions and requirements of this country. . . ." The list included key and other machine types used in the Goodyear welt process. Most of the key machines were by Moenus, Adrian & Busch, Standard and Sagem.

A statement by Mr. Purtell that the purchase policy was set up only after the availability of United's lease-only machinery is urged by United wholly out of context. The record shows that this statement was confined to the lease-only machines purchased in 1955-1956. Previously, he had been asked whether from the beginning of his employment in 1949 he was aware that Hanover had a policy to buy shoe machinery. He answered, ". . . I believe we purchased machines that were—whether it be United's or anyone else's, that were available, on a purchase basis, . . ." but that during those years most major United machinery was necessarily on lease. Also, United's O.M.Rs. in 1951 state that Hanover preferred to purchase as many machines as possible, thereby eliminating unit charges.

On the evidence in this case the conclusion is inescapable that there was very little suitable foreign machinery available and then only toward the end of the complaint period.

But even if foreign machines were comparable in all respects to United machines, it does not mean that shoe manufacturers were free to procure them. High production in short runs is a characteristic of the shoe industry in the United States, and this makes work stoppage due to parts and service difficulties a major problem. Hanover regarded adequate service and a ready supply of parts a most important factor in the purchase of shoe machinery, particularly the more complicated types. In 1952 United recognized the effort "of late" of European shoe machinery manufacturers to introduce their machinery into this country, their plants having recovered from the effects of World War II. The vice president and general manager told the branches, ". . . We are also sure you have in mind the high standard of our service, and we mean that in the broadest sense, the rapidity with which we can adapt styles and conditions, and the availability of our stock of replacement parts. Experience both in this country and abroad indicates you cannot emphasize too strongly the fundamental importance of this parts stock."[12] United recognized the import-

[12]Later in 1952, United's Research Department, after reporting on foreign machines of different types and manufacture, concluded that:

. . .

"Assuming the fact that most foreign shoe machines will eventually live up to our high standards of quality and production, the quantity of major machines of foreign make installed in the U. S. will depend on the efficacy of a suitable maintenance service and parts stock.

"Further assuming that the distribution of these machines and their maintenance service would be handled by companies with branches in the nation's shoe centers such as I. S. M. C. and Compo Shoe Machinery Corp., the parts supply would, to say the least, present a serious problem to their agents. It would be most costly to import spare parts and stock them in sufficient numbers at strategic points, a fact which would reflect in the shoe manufacturers' overhead.

ance of adequate parts for foreign machines installed in domestic factories in the 1950's. Their O. M. Rs. for that period state that a Moenus heel seat laster, and a Standard outsole lockstitcher were unsatisfactory for the reason, among others, that parts service was poor.

Thus, with very few exceptions, it is clear that no domestic non-United or foreign machines, comparable to United machines in capacity and performance, and for which there was service, parts and technical advice, were available to Hanover.

Hanover had sufficient finances to purchase. It had ample working capital. During 1939 and 1940 its current and total liabilities were minimal in relation to current assets, and even to quick assets. United's expert, Dr. Corson, a management consultant on problems of economics, marketing, finance, personnel administration and organization, testified that Hanover had sufficient funds to purchase the machinery here in question without borrowing additional capital. If it had borrowed in 1939, its financial condition

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"Should the United States agents of foreign shoe machinery manufacturers decide to produce spare parts for foreign machines in this country, the cost of fixtures, jigs, etc. for so many various models of different make would make the capital outlay seem prohibitive in view of the limited market.

". . . The shoe manufacturer who has acquired foreign machines at a comparatively low purchase price would also be forced to invest in a costly spare parts stock and to employ a trained staff of mechanics for the maintenance of these machines in an adequately equipped workshop. This, in our opinion, would tend to offset, if not wipe out, the initial saving derived from the purchase of a lower-priced machine and would increase the manufacturing cost of footwear. The above would be true with all major machines such as pulling over, side lasting, outsole stitching, and inseam sewing machines.

. . .

"We, therefore, assume that, while a few major foreign machines may find their way into domestic factories, there is at this time not too great a danger of any mass import. . . ."

was such that the interest would have been at the then prime rate of 1½ percent, or at most 2 percent.

Finally, United argues that the rental and royalty payments, even if higher than the costs of purchase, could not have injured Hanover because the lease terms were uniform among all shoe manufacturers, citing Keogh v. Chicago & Northwestern Ry. Co., 1922, 260 U. S. 156, 165:

> ". . . Here the instrument by which the damage is alleged to have been inflicted is the legal rate, which, while in effect, had to be collected from all shippers. Exaction of this higher legal rate may not have injured Keogh at all; for a lower rate might not have benefited him. Every competitor was entitled to put —and we must presume would have been put—on a parity with him. And for every article competing with excelsior and tow, like adjustment of the rate must have been made. Under these circumstances no court or jury could say that, if the rate had been lower, Keogh would have enjoyed the difference between the rates or that any other advantage would have accrued to him. The benefit might have gone to his customers, or conceivably, to the ultimate consumer."

The Keogh case differs significantly. The action was brought under Section 7 of the Sherman Act against several railroads who were charged with combining to fix unreasonable rates. United was not a public utility and was not regulated. Its rates were not fixed. United was not required to charge uniform rates, and Hanover was not required to accept and pay the same machinery costs as its competitors. If Hanover could have reduced machinery costs by purchase, it should have been free to do so. Com-

petitors might not have had the financial ability, or the borrowing capacity, or the foresight to purchase. It might have been advantageous for some of them to lease and not to purchase. The other manufacturers were not entitled to be put on a parity with Hanover. Consequently, an option to purchase, as distinguished from a uniform rate, might have benefited Hanover. Some manufacturers might not have had a cause of action. Hanover and its claim are unaffected by those who had a cause of action, and did not pursue it, or failed in the attempt.

Hanover has proved that as a consequence of United's monopolization it was unable to purchase most of the more important machines which it would have purchased had they been available.

E. Damages.

1. The Leidesdorf Calculations.

The primary damage claimed by Hanover is the excess of leasing costs over what it would have cost to own the same machines had they been available for purchase during the period from July 1, 1939, to September 21, 1955. This required, among other things, a determination of what the purchase prices would have been. The first time the lease-only machines were offered for sale was in 1955 when United established prices for the sale of its machines new (1955 prices). Hanover's proof consisted of the following steps.

a. The cost to Hanover of the machines presumably purchased by it in 1939, or in any subsequent year when additional machines or replacement machines were presumably acquired by it, was determined by applying the *Bureau of Labor Statistics Consumer Price Index, All Items,* for the years of acquisition, to the 1955 prices.

b. The cost so determined was reduced by the residual value of (1) machines deemed to have been disposed of at the end of an assumed life expectancy and (2) machines on hand on September 21, 1955, the date of the commencement of this action. The reduction was determined by first applying to the 1955 prices the discount table that had been negotiated between United and N. S. M. A. pursuant to the order of the district court (the discount table). Then the *Bureau of Labor Statistics Consumer Price Index, All Items,* for the years of disposition prior to 1955 was applied to the discounted prices.

c. The difference between a. and b. was subtracted from the total rents and royalties paid by Hanover during the complaint period.

d. The estimated cost to Hanover of servicing the machines it presumably purchased was deducted from the remainder. For the 20 major machine types this service cost was based upon the actual service costs Hanover incurred when servicing the 20 major machine types during the year September 1, 1961, to August 31, 1962. No allowance was made for the lower costs that would have been incurred during the complaint period. For the remaining 37 machine types, the service cost was determined by taking that proportion of the service costs for the 20 major machine types for the year ending August 31, 1962, which the rents and royalties paid on such 37 machine types bore to the rents and royalties paid on the 20 major machine types.

Three separate calculations were prepared by S. D. Leidesdorf & Co. (Leidesdorf), Certified Public Accountants, all of which are based substantially on this method, differing mainly in the life expectancy assumed for the various machine types. One was based on a study of the

life expectancies made by Professor Joel Dean, an expert employed by United, and used by it in the course of the negotiations with the N. S. M. A. A second was based on a fifteen year life expectancy, accepted by the Internal Revenue Service for shoe machinery, for all machine types. The third was based on a life expectancy determined from the actual shipments of machines by United to Hanover, and the actual returns of machines by Hanover to United. The damages shown by the three calculations vary between $1,821,431.77 and $1,836,060.90.

United raises several objections to this proof, which it contends renders it "speculation or guesswork" and not within the guidelines established in Keogh v. Chicago & Northwestern Ry. Co., 260 U. S. 156, supra, and Bigelow v. RKO Radio Pictures, Inc., 1946, 327 U. S. 251.

The first objection is that the Leidesdorf calculations are merely mathematical calculations based on assumptions which have not been proven.

The Discount Table. United says it accepted the discount table under the pressure of the decree and the supplemental opinion of March 8, 1955, in the Government case, and after strenuous bargaining with N. S. M. A., and that Hanover used it, without further proof, in fixing the salvage value at given dates of the machines assumed to have been purchased at prior dates.

Hanover was faced with the necessity of establishing a value for machines on hand at the date of commencement of the action, or which had been disposed of previously, to be deducted from the computed costs of machines assumed to have been purchased to arrive at a computed net cost of ownership. Since there was no market price for secondhand machinery, Hanover used the discount table

which reflected age and other conditions. It had no alternative.

United offered testimony that the prices established by application of the discount table did not take into account actual value. This cannot be accepted. Value has different meanings to different persons. The discount table was negotiated. Negotiation is a process of submission and consideration of offers until an acceptable offer is made and accepted. United States v. John McShain, Inc., D. C. Cir. 1958, 258 F. 2d 422, 424, *cert. denied* 1958, 358 U. S. 832. United's contention, in effect, that it was forced to agree to such prices, is without merit. The decree required United, within certain time limits, only to present a plan for the termination of outstanding leases and for the sale of the lease-only machines. There was no attempt to dictate prices, or to force United to accept unreasonable lease and sale terms. Judge Wyzanski's supplemental opinion merely required United to disclose the data on which Joel Dean's calculations were based. Its purpose was to remove unnecessary roadblocks in the negotiations. It did not force terms on United or require it to accept the terms of N. S. M. A. United offered no evidence that the sales prices were in fact unreasonably low. The use of the discount table was proper.

Date of Commencement of Action. The salvage value of machines assumed to have been purchased is supposedly increased because the discount table assumes September 21, 1955, as the correct date for cutting off the estimated life of the machines, thereby diminishing the net cost of ownership. United has not suggested any other date.

The applicable statute of limitations is measured from the date the action was begun, September 21, 1955. Since this is the end of the damage period, the comparison of ren-

tal costs to cost of ownership would have to include machinery values established no later than September, 1955, for those machines assumed to be on hand at that date.

The 1955 Prices. United next argues that the sales prices constructed by Hanover assume, without any proof, that if prices were established by United for machines in 1939 and subsequent years, it would have established the prices so constructed, even though the 1955 prices were fixed under 1955 economic conditions, and under the mandate of the decree providing that sales prices could not be fixed so as to make it substantially more advantageous to lease, and that this is sheer speculation because those economic and legal conditions did not exist in 1939 and later years.

The issue is whether the prices computed by Hanover are reasonable. Dr. Corson testified that the 1955 prices, with the application of a proper index, were essential to the calculations. The 1955 prices have been adjusted to reflect economic conditions existing at the time the assumed purchases were made. The limitation that it could not be more advantageous to lease did not depress prices, because rents and royalties were not fixed or regulated. United had complete freedom to fix its lease terms and sales prices at any level. The limitation is not material to the reconstructed prices. The 1955 prices were not an assumption but a fact. The consumer price index used was also a fact.

Machine Shipments and Returns. United next argues that the Liedesdorf calculations include a practical suppression of machine returns, which occurred often, in that returns ". . . are treated most artificially through a series of accumulations until the totals accumulated reach the totals previously leased, when the deductions are made to show a putative transaction of indefinite character looking like a

re-sale . . . ," and whether or not this treatment favors United, the result is ". . . unjustifiable as a matter of principle in falsifying the facts concerning machinery returns by which the court and the parties are bound in the ascertainment of 'damages' "; that ". . . ignoring returns under Form A leases until cumulative returns had exceeded cumulative shipments, is only another indication that the Leidesdorf procedures rest on the speculation that every machine in fact returned could and would have been promptly sold upon a different market at an established price. . . ."

The argument is not clear and appears to misconstrue the manner in which machine returns were considered in the calculations. As a part of its approach, Hanover had to determine how many machines, if purchased, would have been required to maintain its production. Between 1939 and 1955 machines were received from United and returned to United. Hanover did not credit itself with the return of a machine because the shipment and return data showed the return in a particular year. This was in order not to take advantage of returns a lessee, and not an owner, might make because of cyclical fluctuations in production. Hanover credited itself with returns only to cumulatively offset shipments at a given time, and shipments were considered purchases only when shipments exceeded returns at a given time. This is reasonable and does not render the calculations speculative or conjectural. If Hanover had used individual returns, it would have increased the damages. United has not proved that a consideration of individual shipments and returns would decrease the amount of damages.

2. Elements Not Included in the Leidesdorf Calculations.

United attacks the Leidesdorf calculations because cost of capital, future worth and taxes are not included, and a proper index was not used.

Cost of Capital. The Leidesdorf calculations do not include cost of capital. Cost of capital is an economic concept which has been defined as "the rate of return expected by investors on capital funds they place at . . . [a concern's] disposal." Dr. Corson testified that a company usually gets its capital in four ways: debt, preferred stock, common stock and retained earnings, and that during the damage period Hanover derived its capital from the sales of common stock and retained earnings. He computed Hanover's cost of capital in two ways. First, he took the percentage of earnings per share to the price per share of common stock for the seven years (1940, 1941, 1942, 1948, 1949, 1950, 1951) in which common stock was sold. The weighted average was 22.14 percent. He also took the percentage of net profit after taxes to stockholders' equity for the years 1939 to 1955: This average was 14.1 percent. Using the 14.1 percent, Dr. Corson made certain adjustments to the calculations. He concluded that purchases would not result in an investment return greater than the cost of the capital invested, and that the purchases were economically unsound.

If cost of capital is a necessary element of the damage calculation, the rate used by Dr. Corson does not reflect the true cost that Hanover would have had to pay or offer to attract capital. The measurement of cost of capital is vague. "Quite apart from the practical difficulties of measuring capital cost for a specific company, there is today no explicit and generally acceptable account of what is the correct concept, actual approach to its measurement. . . . The best known exception is the work of Professor Joel Dean but

even his most comprehensive statement regarding the cost of capital is neither explicit nor complete." Solomon, *The Management of Corporate Capital*. Dr. Corson cited this work and that of Joel Dean in support of his testimony. "A person who desires neat solutions with one correct answer should avoid the computation of a corporation's cost of capital. Usually such an answer is impossible. If ten 'experts' independently computed the cost of capital of the IBM Corporation, there would be ten answers." Bierman & Smidt, *The Capital Budgeting Decision*. While Dr. Corson also cited this work, he disagreed with this particular view. Dr. Cyert, Hanover's expert, agreed with these authors, and listed other authorities who emphasize the difficulties in the measurement of the cost of capital.

The inexactness in its measurement is demonstrated by Dr. Corson's averages of 14.1 and 22.14 percent. The percentage of earnings per common share to price per common share ranged from 7.8 percent in 1940 to 54.5 percent in 1948. The percentage of net profit after taxes to stockholders' equity, while not fluctuating as sharply, ranged from a low of 6.72 percent in 1945 to a high of 32.59 percent in 1947. To demonstrate the inexactness also, Hanover suggests that the percentage of earnings per share to the sales price per share on a secondary issue of Hanover stock in 1956 was 8 percent. This was the first public sale of Hanover stock. Prior to that time, stock acquisition rights were limited to descendants of the original founders of the company, and certain key employees, and sales were at a discounted price reflecting book value after certain downward adjustments of capital and surplus in accordance with a predetermined formula. Both experts agreed that in measuring cost of capital in this way market value is used, and if there is no market value, then the market value

of stock of similar companies. Yet, Dr. Corson was satisfied with discounted sales to family and key employees. Mr. Spence, who for many years dealt in corporate stock and securities matters, testified that during the damage period Hanover's stock, if publicly sold, would have had a market value of a minimum of ten times earnings, and probably as high as 13 times. This would indicate a cost of capital of 8 or 10 percent. Mr. Spence's opinion was based in part on the market value of stocks of other shoe manufacturers. Dr. Corson thought that the 1956 public issue was not relevant to the damage period, and that the market price of stocks of similar companies were not material because his figures were the actual cost of capital experienced by Hanover. This ignores the fact that the bulk of the assumed purchases would have been in 1939. The evidence shows that these purchases would have resulted in a cost of capital different than that actually experienced during the damage period.

Hanover had other sources of capital. It made substantial loans in 1942 and in 1951 at interest rates of 2 to 2.5 percent. In 1942 it borrowed $300,000 without interest from two of its "family" stockholders. The borrowings were infrequent and for the most part relatively small—5.8 million during the same period, with 2.1 million the largest amount outstanding at any one time. ($535,000 is the approximate cost of the machines to Hanover in 1939.) Dr. Corson did not consider debt because he concluded it was not a principal source of capital.

Dr. Corson did not consider preferred stock as a source of capital. In 1946, Hanover issued 2.5 million of preferred stock with a 5 percent dividend. Dr. Corson said capital "was not derived in any significant part from preferred stock. . . ." It has enough significance so that it should not

have been ignored as an independent source. Moreover, in arriving at the 14.1 percentage, stockholders' equity, to which profit after taxes was compared, included preferred stock. Dr. Corson said this rate was "what the stockholders essentially earned on the money they had supplied and supplied either by the purchase of stock or by the retention of earnings. . . ." The preferred stock was non-participating, and, thus, to the extent that such profit exceeded the preferred dividend rate, it does not represent what preferred stockholders earned on their capital.

Dr. Corson admitted that his figures do not represent a cost in an accounting sense. He testified that a concern which has a cost of idle capital of 14 percent and which borrows additional capital at 2 percent, and invests it at a 10 percent return, makes a profit for income tax purposes, but suffers an economic loss. He testified that an economic loss and actual profit and loss are not the same, and that such an economic loss, while difficult to identify in the profit and loss statement in any year, in the long run will be reflected in the profit and loss statement. To include the cost of capital in Hanover's damage calculation would require an examination of the wisdom of every corporate investment. While Dr. Corson admitted that Hanover at all times had sufficient capital to purchase the machines, there is no evidence why Hanover borrowed from time to time. In many instances the loans were less than the amounts of the assumed capital purchases. Such a corporate decision to borrow funds, under Dr. Corson's testimony, would be unwise. It illustrates that a company may choose to act notwithstanding the cost of capital indicated that it should not.

Dr. Cyert, on the other hand, emphasized that the cost of capital is only a decisional guide which should form no part of a damage calculation.

In the Borden Co., 1962, 3 CCH Trade Reg. Rep. para. 16,191, a Federal Trade Commission case, Borden attempted to defend a charge of illegal price discrimination under the Robinson Patman Act on the ground that differences in prices resulted from differences in costs. One element of cost was "Investment Cost" which appears to be of the same nature as the cost of capital. The Commission rejected it as a proper cost item:

> "Respondent's cost study fails for other reasons. For instance, it claims an 'Investment Cost' difference of $.0404 per case. Respondent apparently kept larger inventories of Borden brand evaporated milk than of the private label. In its analysis, it concludes that the money invested at 8% resulted in an inventory cost of $.0835 per case for Borden brand and an inventory cost of $.0257 per case for private label. The fallacy in this position is that the so-called 'Investment Costs' is not an actual, incurred cost at all; it amounts to a return on capital investment. Accordingly, this item is rejected for cost justification. Cf. Thompson Products, Inc., 55 F. T. C. 1252, 1265-1266 (1959)."

On the record there is no clear measurement for cost of capital. Even if measurable, it is not a proper element of the damage calculation. Cost of capital is a guide, not rigid or inflexible, which with other considerations such as opportunity, preference, necessity and the like, may dictate action and policy. Cost of capital, other than interest on borrowed funds, is not an item of cost or expense that would directly affect Hanover's profits and losses in any year. The financial statements and the testimony of Dr. Cyert and Mr.

Spence, however, indicate that Hanover would have borrowed the necessary capital for the purchase. The calculations should be adjusted to reflect a 2.5 percent interest rate.

Future Worth. United argues that future worth is a mere matter of compounding the actual machinery investment at the appropriate cost of capital; that its application to the calculations is proper because "Anyone can see that, if Hanover could have put the purchase price of machinery in a savings account and obtained over 16 years a compounded return on its money at the rate of 14%, it would be folly to make the same investment in a purchase that would not earn at least that rate of return."

Future worth does not represent a cost to Hanover. The compounding of alternative investments at the given rate over a given period indicates which investment provides the greatest return. But again it is only a guide. It does not reflect other considerations such as opportunity, preference and necessity. It does not directly affect the profit and loss statements, and would not directly enter into the determination of profit and loss in any year. The damages will include interest on the borrowed funds. Future worth is not a proper element of the damage calculations.

Taxes. Any recovery by Hanover will be subject to taxation in its entirety. Commissioner of Internal Revenue v. Glenshaw Glass Co., 1955, 348 U. S. 426. The Leidesdorf calculations do not take into account tax consequences, such as deductions for rents and royalties, and capital gain treatment for machines disposed of at greater than depreciated book value. Generally in tort and in breach of contract actions taxes are not considered in assessing damages. The cases are collected in 63 A. L. R. 2d 1393 and 1433. In

Cereal Byproducts Co. v. Hall, 1958, 16 Ill. App. 2d 79, 147 N. E. 2d 383, the court held that an income tax refund received by plaintiff as a result of embezzlements should not be considered in mitigation of damages for defendants' failure as auditors to uncover the embezzlements:

> ". . . On defendants' theory every suit for damages would necessitate consideration of the income taxes saved by the plaintiff on account of the loss and the taxes payable on account of the recovery. The same principle applies as would apply in the event plaintiff had carried insurance against these embezzlements. Neither payments by the insurance carrier nor tax refunds can mitigage defendants' liability. The insurance carrier would have an interest in the recovery from the defendants just as the federal government has a tax interest in the recovery by plaintiff. We think that the court erred in giving defendants credit for the income tax refund."

In the trial on the separate issue, the late Judge Goodrich said: "Things which happen later and let an injured plaintiff escape some of the ultimate consequences of the wrong done him do not inure to the benefit of the defendant. . . ." 185 F. Supp. 826 at page 829, supra. The tax consequences are extraneous to the damage caused by United, and are not a part of the calculations.

Consumer Price Index. There is no price index for shoe machinery. Dr. Gorson testified that the Consumer Price Index was not proper for the conversion of shoe machinery prices because the index is constructed to measure commodities that wage earners and clerical workers "purchase as their cost of living", such as food, clothing, toys and the like; and that a more precise index would be a

"leasing cost index," which would "relate the prices of shoe machinery in 1955 to hypothetical prices—because that's what we are dealing with in the earlier years as the rentals in 1955 varied in earlier years." He did not detail the mathematics, but estimated under this index an increase by 20 percent of the excess of cost of ownership over cost of leasing, calculated after the inclusion of the omitted elements. His work papers showed that the computed net cost of ownership was $71,000 less than that arrived at through application of the Consumer Price Index. If the index were the only matter in issue, and Dr. Corson's index were used, Hanover would be entitled to an additional $71,000. However, through application of the omitted elements, this index produced a result by which a computed excess of cost of ownership over cost of leasing went from $949,720 to $1,169,366.[13]

Dr. Cyert testified that the Consumer Price Index is a reasonable indicator of the general price level and the general trend of prices, since it is based on a measure of the cost of living for a large segment of our society, and while there is no measure for everything that happens in our many dimensioned society, the index was reasonable and a proper one for this case. The Consumer Price Index resulted in a relationship of 1939 prices to 1955 prices of 51.9 percent. Using a leasing cost index based on the 20 major machines in the damage calculation, the percentage was 52.9. And with an index developed from United's prices for its optional machines the percentage exceeded 51.9 only in the case of two of the 58 listed machines. The application of the Consumer Price Index was proper.

[13]Using the Consumer Price Index and including the omitted elements, Dr. Corson had computed an excess of ownership costs over leasing costs of $949,720.

Expert Testimony. It is not clear whether United contends that expert testimony was necessary to prove all elements of the calculations. Whether expert opinion is required is a matter within the discretion of the court. Conry v. Baltimore & O. R. Co., 3 Cir. 1953, 209 F. 2d 422. Expert testimony is permitted if the court determines it is necessary to aid the fact finder in a full understanding of the issues. Steward v. Atlantic Refining Co., 3 Cir. 1957, 240 F. 2d 715. Expert testimony to support the calculations was supplied to the extent needed. Dr. Cyert gave his opinion on the propriety of certain elements used in or omitted from the calculations. The adverse opinion of Dr. Corson clearly defined the issues, so that the court is in a position to decide them. United's criticism of the testimony of Dr. Cyert is not supported by the record. Moreover, the underlying factual data was proved, and the assumptions on which the calculations were prepared were reasonable.

In William Goldman Theatres, Inc. v. Loew's, Inc., E. D. Pa. 1946, 69 F. Supp. 103, *aff'd per curiam*, 3 Cir. 1948, 164 F. 2d 1021, *cert. denied*, 1948, 334 U. S. 811, the trial court said:

> ". . . Naturally, the plaintiff could offer no record of past performance at the Erlanger. The defendants' wrongful conduct precluded it from doing so. In its place, the plaintiff produced complete data showing the business done and profits earned at each of the other first-run-theatres in Philadelphia, including the nearby Mastbaum, during the damage period. Is the evidence sufficient? . . .
>
> "I do not pretend that there is not an element of speculation or guesswork in making an estimate of probable profits on the evidence presented. The fact,

however, that only approximate accuracy is required by the decisions of the Supreme Court indicates that no one expects the impossible and that every estimate of what would have occurred under hypothetical conditions is bound to contain elements of speculation. But the evidence, I think, is sufficient on which to reach a reasoned conclusion the basis of which is relevant, informative and logically significant data."

The damage calculations, subject to an adjustment for interest and to the elimination of certain machines, provide an approach and rational basis for a reasoned conclusion.

3. Estoppel.

Hanover is not estopped from contending that cost of capital is a part of machinery investment because of the 1955 negotiations between N. S. M. A. and United. See 31 C. J. S. Estoppel, §§ 107 et seq. The discount table, on which the negotiated prices depended, was revised several times during the negotiations. Mr. Salinger, a United witness, testified that prices were arrived at "on a purely bargaining position" without regard to costs, values or any so-called "equivalency formula."[14] To facilitate agreement, the economic experts, all of whom argued for cost of capital, were finally excluded from the negotiations. There is no

[14]Andrews, Anthony & McLean—*Sales Prices for Outstanding Shoe Machinery*, at page 10: "For the limited purpose of fixing the starting point in the calculation of secondhand prices and without conceding its correctness for any other purpose, we accept the concept of 'economic equivalence' used in the Dean Report—that is, 'a set of lease terms and a sale price so related that it will be a matter of indifference to the shoe manufacturer if he acts solely in his economic best interests, whether he elects to lease or to buy' and 'an equivalent price is one that makes ownership costs just equal to leasing costs'." (Footnotes omitted.)

evidence that Mr. Sheppard, although a member of the N. S. M. A. negotiating committee, ever agreed with the cost of capital concept.

Dr. Robert N. Anthony's report *Shoe Machinery: Buy or Lease* issued as a guide to N. S. M. A. members also does not work an estoppel. Hanover considered the number of years required to return its investment. This is commonly referred to as the "payback method" which according to Dr. Anthony's report ". . . provides no way of measuring *how much* more . . . [than the investment a shoe manufacturer] . . . will get back. . . ." This approach is not a guide to the investment return. The only other cost of capital considered by Hanover in its evaluation was interest on borrowings.

4. Statute of Limitations.

United raises the Pennsylvania statute of limitations as a bar to the admissibility of the Leidesdorf calculations because they include machines on leases executed prior to July 1, 1939.

The Pennsylvania six year statute of limitations and the scope and meaning the Pennsylvania courts give to it in analogous suits govern this action. 12 P. S. § 31;[15] Chattanooga Foundry and Pipe Works v. City of Atlanta, 203 U. S. 390, supra; Gordon v. Loew's, Inc., 3 Cir. 1957, 247 F. 2d 451; Shapiro v. Paramount Film Distributing Corp., E. D. Pa. 1959, 177 F. Supp. 88, *aff'd* 3 Cir. 1960, 274 F.

[15]Although the statute of limitations is six years, the damage period is from July 1, 1939, to September 21, 1955, as a result of the tolling provisions of the Clayton Act, 15 U. S. C. A. § 16, prior to its amendment on July 7, 1955, and the Wartime Tolling Act, Act of October 10, 1942, c. 589, 56 Stat. 781, § 1, as amended June 30, 1945, c. 213, 59 Stat. 306.

2d 743. The time when the cause of action accrues, however, is a federal question to be determined by federal law. Momand v. Universal Film Exchange, Inc., D. Mass. 1942, 43 F. Supp. 996; Delta Theaters, Inc. v. Paramount Pictures, Inc., E. D. La. 1958, 158 F. Supp. 644.

In Cardinal Films, Inc. v. Republic Pictures Corp., S. D. N. Y. 1957, 148 F. Supp. 156, defendant granted plaintiff an exclusive license to distribute prints of 30 motion pictures, provided plaintiff ordered from defendant exclusively all prints required for distribution of the pictures. Defendant furnished plaintiff with 658 prints, and because plaintiff was unable to get the film processing done elsewhere, under the agreement, it brought an action charging defendant with monopolization, restraint of trade, and the enforcement of an illegal "tie-in" provision. It alleged that defendant charged higher prices for the prints than it charged to other purchasers of similar prints, and higher prices than plaintiff could have obtained from other film processors. The court held that the statute of limitations did not bar a recovery for prints furnished during the period not barred, pursuant to the license agreement which had been executed in the period barred:

> ". . . It appears that of the 658 prints of the licensed pictures furnished by defendant to plaintiff under the contract, only 46 were furnished within the four year period. Inasmuch as plaintiff complains of a continuing violation of the antitrust laws, only so much of his damages as are attributable to those 46 prints are beyond the bar of limitations, if he has a valid cause of action. The situation is not like those in cases involving a statute of limitations in connection with continuing conspiracies. . . . While action

> does not lie for a continuing conspiracy as distinguished from the overt act that puts it into execution, action does lie for a continuing violation such as is here alleged. . . . The continuing violation involves the defendant's conduct (if it be a violation) in continuing the practices complained of under the contract. If more affirmative action on the part of the defendant causing damage to the plaintiff is required, . . . it may be, as alleged in plaintiff's affidavit, the defendant's refusal to relieve the plaintiff of the restriction in the contract. At least an issue of fact on that point is raised."

United attempts to distinguish Cardinal Films because the license agreement was not self-executing—Cardinal was to order the films it would distribute. This distinction is without substance. The right to distribute the motion pictures was meaningless unless Cardinal obtained the prints. Cardinal could escape the consequences of this requirement only by not taking advantage of its contractual right to distribute the motion pictures. Both the Cardinal agreement and the Form A leases were executed prior to the limitations period. Both defendant (Republic) and United could have changed their conduct, which was a continuing violation of the law.

In Muskin Shoe Company v. United Shoe Machinery Corp., D. Md. 1958, 167 F. Supp. 106, which concerned United's Form A leases, the court held the antitrust injury was inflicted when the leases were executed, and that payments made during the period not barred by the statute, but pursuant to leases executed during the period barred by the statute, could not be included in the damage calculation. While a decision by another district court is entitled

to great respect, the Muskin decision to the extent that it supports United's contention will not be followed in this case. The court reasoned:

> "... Plaintiff's claim of damages with respect to each lease on which it may be entitled to recover will require a consideration of the difference, if any, between the payments called for by the lease and the payment or payments which would have been reasonable under competitive conditions at the time the lease was made. This consideration will require complicated calculations with respect to each type of machine and each date of leasing. If similar calculations had to be made for every date on which a payment under every lease fell due or was made, the detail would be overwhelming. The general rule is the common sense rule in this case."

The extent of the detail should not control the proof of Hanover's claim. This burden falls initially and primarily on Hanover, and United cannot escape the consequences of its acts because it put Hanover to the task of accumulating a mass of detail. Moreover, Hanover's proof does not constitute overwhelming detail. United had ample opportunity to question the Leidesdorf calculations. Also, in Muskin the damages and injury were alleged to be the result of the unreasonable rental charges. Plaintiff conceded the legality of the leases, while at the same time it sought to void the rentals by the antitrust action. Hanover's alternate damage claim, which is the unreasonableness of the rental and royalty charges, has been disallowed. Its primary damage claim is not an attack on these charges. The injury and claimed damage flows from a continuing violation of Hanover's right to deal in a free market. Recovery measured by the

difference between payments made after July 1, 1939, pursuant to leases executed prior to that date, and the assumed cost of ownership, is not barred by the Pennsylvania six year statute of limitations.

This conclusion finds support in other cases. In Streiffer v. Seafarers Sea Chest Corp., E. D. La. 1958, 162 F. Supp. 602, a conspiracy case, in speaking generally on the accrual of a cause of action under the antitrust laws, the court said at page 606:

> "Under these circumstances it is more appropriate to analogize the antitrust suit to actions for injuries to real property, and, in particular, to actions arising out of a continuing, but abatable nuisance, where the incidence of continuing damage may depend on speculative factors, including the uncertain operation of the seasons. In such cases, and in antitrust cases, the rule is that the cause of action accrues on the occurrence of actual damage, and successive damage gives rise to successive causes of action against which the statute of limitations will run as they accrue day by day." (Footnotes omitted.)

In Highland Supply Corp. v. Reynolds Metal Co., 8 Cir. 1964, 327 F. 2d 725, a non-conspiracy case, the complaint charged that defendant's 1956 acquisition of a company and its 1957 cutting of prices permitted it, in violation of Section 7 of the Clayton Act and Section 2 of the Sherman Act, to monopolize the florist foil market, which resulted in a loss of sales, lower sales, a prevention of normal increase in sales, and other consequences. The district court held the action was barred by the statute of limitations because the acquisition and price cutting actions, which caused the

injury, occurred more than four years prior to the filing of the complaint in 1963, even though plaintiff continued to suffer damages during the four years preceding the filing of the action. The court of appeals reversed:

> ". . . Appellant's complaint, liberally construed (as it should be under Rule 8(f), F. R. C. Pro., 28 U. S. C. A.), makes claim for damages because of appellee's violation of Section 2 of the Sherman Act, supra, during the entire time that Reynolds possessed monopoly power. The statute of limitation in respect to a private right of action under Section 5(b) of the Clayton Act, supra, 'beg (ins) to run when the cause of action (arises), and the cause of action (arises) when the damage occur(s).' Then only can the action be brought. . . .
>
> "Irrespective of the date of 'acquirement' of Arrow by Reynolds, or the first 'price-fixing' date as considered by the District Court, we must rule that the instant complaint reveals facts as to abuse of 'monopoly power' which under proper showing, injury and damage to appellant's business might possibly be established within the limitation period as provided in Section 5(b) of the Clayton Act. To hold otherwise, as the District Court rules, is to say that some damage that might have been sustained by appellant was barred before it accrued; i.e. before appellant sustained injury to its business or property because of appellee's continuous violation of Section 2 of the Sherman Act. The question is simply one of factual proof.
>
> "Damages claimed in a private antitrust suit must be different from those suffered by the general

> public—i.e. they must be special to the claimant. . . . It is existence of monopoly power and the exertion thereof on the business of a competitor, in a relevant market, that gives rise to such a claim. . . . Such right of action may arise from day to day. . . . It is well settled that where a private cause of action under the antitrust law is based upon a continuous invasion of one's rights, his cause of action accrues from day to day as his rights are invaded to his damage. . . ."

See also Delta Theatres, Inc. v. Paramount Pictures, Inc., E. D. La. 1958, 158 F. Supp. 644, 649; Susser v. Carvel Corp., S. D. N. Y. 1962, 206 F. Supp. 636, 651-2, *aff'd* 2 Cir. 1964, 332 F. 2d 505.

Both parties have cited cases involving an interpretation of the Pennsylvania two year statute of limitations in personal injury actions not resulting in death. 12 P. S. § 34. Hanover had a continuing right not to be injured in its business or property in the manner asserted under the facts of this case. The Pennsylvania statutes of limitations which involve continuing injuries to property limit the damage period to six years before the commencement of the action. See cases collected in Daniels v. Beryllium Corp., E. D. Pa. 1962, 211 F. Supp. 452, 455, n. 4.

Daniels was a diversity case in which Pennsylvania law was applied. Plaintiff became ill in 1949; her condition was diagnosed in 1953 as beryllium poisoning, and the action was filed on July 1, 1958. In considering the limitation in 12 P. S. § 34, District Judge, now Circuit Judge, Freedman held that the statute began to run in 1953 and the only recoverable claim was for the additional poisoning that occurred between July 1, 1956, and July 1, 1958. There is no

question that if the action had been started within two years of 1953, there would have been recovery for the period from 1949. There is no evidence that Hanover knew or should have known of United's illegal monopolization before 1939. United's charge that Mr. Sheppard knew of United's wrong since 1921 is not supported by the record which shows only that he was dissatisfied with United's policies. Even if Mr. Sheppard did know prior to 1939 that United's acts provided a basis for a cause of action, as long as United continued to monopolize the shoe machinery market Hanover could bring an action for the continued monopolization within the six year period, just as the plaintiff in Daniels could bring an action for the continued contamination within the two year period.

The Pennsylvania six year statute of limitations does not render the Leidesdorf calculations inadmissible.

5. The Passing-On Defense.

This contention is that since Hanover paid the same lease charges as its competitors, and passed these charges on to its customers, there has been no damage. United insists that the ruling of Judge Goodrich that the passing-on of damages is not a defense in this action (185 F. Supp. 826, supra) does not foreclose this court from deciding on the facts that no damage was sustained, because Judge Goodrich assumed an antitrust violation, assumed excessive charges amounted to injury, and did not get to the issue of whether the damages were in fact passed on.

United relies on Judge Goodrich's statement that "The Court thinks this argument [of passing on] is invalid; otherwise, it would be necessary to go into the evidence concerning the factual accuracy of the argument." Judge

Goodrich also said, ". . . that where the plaintiff is a consumer of the product, rather than a middleman who resells it, he may recover the excess paid whether or not he has ultimately passed the excess along to his customers." Moreover, the hypotheses on which Judge Goodrich proceeded have been proved in this trial. His decision is controlling.

United argues, however, that the distinction between a middleman and a consumer, on which Judge Goodrich based his decision, and which was reaffirmed in Freedman v. Philadelphia Terminals Auction Co., 3 Cir. 1962, 301 F. 2d 830, is an unsound distinction, and that the correct principle is that adopted in Wolfe v. National Lead Co., 9 Cir. 1955, 255 F. 2d 427, *cert. denied* 1955, 350 U. S. 915. The Third Circuit cases will be followed. See also Commonwealth Edison Co. v. Allis-Chalmers Mfg. Co., N. D. Ill. 1963, 225 F. Supp. 332, *aff'd* 7 Cir. 1964, 335 F. 2d 203; Atlantic City Elec. Co. v. General Elec. Co., S. D. N. Y. 1964, 226 F. Supp. 59.

F. Laches.

United cites Tobacco and Allied Stocks v. Transamerica Corp., D. Del. 1956, 143 F. Supp. 323, *aff'd* 3 Cir. 1957, 244 F. 2d 902, and Royal Air Properties, Inc. v. Smith, 9 Cir. 1962, 312 F. 2d 210, for the proposition that the doctrine of laches is a defense to a suit at law to enforce a federally created right. Neither of these cases supports that proposition. Both involved claims pursuant to Section 10 of the Securities and Exchange Act of 1934, and Rule X-10B-5 of the rules issued by the Securities and Exchange Commission, which provided for both legal and equitable remedies. In Tobacco and Allied Stocks, the court held that the enforcement of rights under a section allowing both legal

and equitable relief could be limited by both the statute of limitations and laches. The court of appeals affirmed without specifically deciding the question of whether the statute of limitations, or laches, or both, governed.

The rights accruing to Hanover under Section 4 of the Clayton Act are enforceable only at law. Fleitmann v. Welsbach Street Lighting Co., 1916, 240 U. S. 27 (this case involves a predecessor to Section 4 of the Clayton Act). Burnham Chemical Co. v. Borax Consolidated Ltd., 9 Cir. 1948, 170 F. 2d 569, *cert. denied* 1949, 336 U. S. 924. As stated in Tobacco and Allied Stocks, supra, "[W]here the action is termed one at law for which only legal remedies are available, the court will look to the local law of limitation. . . ." United has cited no case, and research has disclosed none, where laches was applied to a case at law in which damages were sought and no equitable remedies were available. Laches is not a defense. Therefore, a discussion of Hanover's conduct is not required. It is sufficient to say it did not constitute laches.

G. Conclusion and Computation of Damages.

This court has jurisdiction of the subject matter of this action and of the parties hereto (15 U. S. C. A. § 2; 15 U. S. C. A. § 15). United violated Section 2 of the Sherman Act (15 U. S. C. A. § 2) by monopolizing the trade and commerce among the several states in shoe machinery, other than dry thread sewing machinery. As a result of United's unlawful monopolization, Hanover was required to pay more for the use of the shoe machinery it needed and used than it would have been required to pay in a free and competitive market. As a result of United's unlawful monopolization, Hanover was injured and sustained dam-

ages. The period of time for which Hanover can recover damages is July 1, 1939, through September 21, 1955.

An order will be entered requiring Hanover to recompute its damages. This court adopts $1,830,640 as the starting point. This is the average of Hanover's three sets of calculations, as adjusted to reflect the changes in Hanover's Exhibit P-123. Each set of calculations is to be adjusted to exclude damages for the following machines for the periods indicated, because comparable machines were available to Hanover from non-United sources.

| Machine Type | Period |
|---|---|
| Upper Leather Clicking Machine | 1950-1955 |
| Sole Leather Dieing Out Machine | 1941-1955 |
| Sole Laying Machine | 1951-1955 |
| Outsole Rapid Lockstitch Machine | 1939-1955 |

The calculations are to be adjusted to include interest of 2.5 percent, to be computed by the same method used by Hanover in its Exhibit P-53. The calculations as adjusted are to be averaged and the resulting figure submitted to the court.

/s/ MICHAEL H. SHERIDAN
Chief Judge
Middle District of Pennsylvania

Dated: APR. 28, 1965

**Notice of Motion**

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF PENNSYLVANIA

[SAME TITLE]

SIRS:

PLEASE TAKE NOTICE that pursuant to Rule 59 of the Federal Rules of Civil Procedure and 28 USC § 1651(a) and upon the findings of fact, conclusions of law and opinion filed April 28 1965, the annexed affidavit of Ralph M. Carson sworn to June 9 1965 and exhibits thereto, the annexed transcript of colloquy and ruling of the United States District Court for the District of Massachusetts, Wyzanski J. on May 28 1965 in *United States* v. *United Shoe Machinery Corporation* (CA No. 7198) and upon all prior proceedings, defendant will move June 17 1965 at 2:00 p.m. in the United States District Court for the Middle District of Pennsylvania in the Post Office Building in the City of Harrisburg, Pennsylvania before Hon. Michael H. Sheridan, Chief Judge,

(1) for a new trial on the issues relating to the findings and decree in said Government case (as described in the opinion herein at pp. 12-17, 23-27 and 37-39); and in connection therewith

(2) for remission or certification by this Court to the United States District Court for the District of Massachusetts, in accordance with its jurisdiction reserved in par. 23 of the decree in said Government case, of the questions

(a) whether said decree, together with the opinion, findings and conclusions in the case, determined the existence before its effective date June 23 1954 of any legal duty or obligation on the part of defendant to offer for sale its leased machines;

(b) whether before the date January 1 1955 fixed pursuant to the decree any legal duty or obligation existed on the part of defendant to offer for sale its machines theretofore offered for lease only;

(c) whether the lease-only system of the defendant as applied in the period 1939-55 was in itself, and independently of the four restrictive clauses or practices described in par. 4 of the decree in the Government case, a violation of the antitrust law within the meaning of the decree, together with the opinion, findings and conclusions in the Government case; and

(d) whether the provisions of the decree in the Government case requiring changes in defendant's business practices and action to be taken with respect to the existing leases were, in their adjudicatory effect and operation, retroactive or declaratory of pre-existing rights and obligations as between defendant and its lessees or customers or were instead prospective and remedial only;

(3) for amendment of the findings of fact, conclusions of law and opinion filed herein on April 28 1965, and the entry of new findings of fact and conclusions of law directing dismissal of this action, on the merits;

together with such other and further relief as may be proper.

Dated: New York, N. Y.
June 9 1965

DAVIS POLK WARDWELL SUNDERLAND
& KIENDL

By R. M. CARSON
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Attorneys for Plaintiff

**Affidavit of Ralph M. Carson Read in Support of Motion for Partial New Trial**

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF PENNSYLVANIA

[SAME TITLE]

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

RALPH M. CARSON, being duly sworn, says:

I am a member of the firm of Davis Polk Wardwell Sunderland & Kiendl, attorneys together with Messrs. Warren, Hill, Henkelman & McMenamin of Scranton, Pennsylvania for defendant in this action, and tried the case on its behalf. This affidavit is made in support of defendant's application for a new trial upon that part of the issues covered by this Court's construction of the controlling Government antitrust suit (opinion pp. 12-17, 23-27 and 37-39), upon the grounds (a) that the voluminous record in the Government case (14,194 pages of transcript covering 121 trial days: 110 F. Supp. at 299) shows such construction to be erroneous and (b) that the trial judge in the Government action, Hon. Charles E. Wyzanski, so indicated in a hearing therein May 28 1965.

1. The controlling effect of the findings and decree in the Government case, as regards the decision of this Court, is indicated by the opinion at p. 12:

> "Hanover relies primarily on the decree, findings, conclusions, and opinions in the Government case, as proof of United's illegal monopolization of the shoe machinery industry in the United States, pur-

suant to Section 5 of the Clayton Act, 15 U. S. C. A. § 16, which provides:

> "(a) A final judgment or decree heretofore or hereafter rendered in any civil or criminal proceeding brought by or on behalf of the United States under the anti-trust laws to the effect that a defendant has violated said laws shall be prima facie evidence against such defendant in any action or proceeding brought by any other party against such defendant under said laws or by the United States under section 15a of this title, as to all matters respecting which said judgment or decree would be an estoppel as between the parties thereto: . . .' "

2. This Court's construction of the decree, findings and conclusions in the Government case, which is of course an essential basis of the liability indicated by the opinion filed April 28, seems to find in the Government decree an implied duty on defendant's part to offer its shoe machinery for sale in the period 1939-55, and also to find therein a determination that defendant's lease-only system in that period was illegal in itself.

3. This decision is respectfully submitted to be erroneous and to justify and require a new trial upon the particular issue——

(a) upon the grounds previously urged;

(b) upon the language of the decree itself, which is not ambiguous, hence does not require interpretation from the language of the opinion, findings and conclu-

sions, and excludes from its determination the lease-only system as such and any pre-existing duty or obligation to offer for sale;

(c) upon certain passages in the voluminous trial record in the Government case, which are referred to in par. 6 of this affidavit and which have not been heretofore called to the attention of the Court; and

(d) upon the indications given by Judge Wyzanski at a hearing in the Government case in the District of Massachusetts May 28 1965, appearing in the transcript attached hereto as Annex 1.

4. The Government case is presently the subject of proceedings before Judge Wyzanski in the District of Massachusetts pursuant to decree par. 18, which requires a report to the Court as of January 1 1965 concerning the effect of the decree, with a view to possible modification at that time. Both the Government and defendant have filed reports and petitioned for modification.

In view of this Court's decision herein filed April 28, defendant on May 21 1965 gave notice to the plaintiff herein and to the Government of an application to construe or amend the Government decree, in so far as dealt with in this Court's decision, pursuant to the reservation of jurisdiction in the Government decree as follows:

"23. Jurisdiction of this cause is retained for the purpose of enabling either of the parties to apply to this Court at any time for such further orders and directions as may be appropriate for the correction, construction, or carrying out of this Decree, and to

set aside the Decree and take further proceedings if future developments justify that course in the appropriate enforcement of the Anti-Trust Act."

This application was made returnable before Judge Wyzanski in the District of Massachusetts May 28 1965. The proceedings thereon are set forth in Annex 1 hereto.

As shown by Annex 1, Judge Wyzanski declined to make the construction or amendment of his decree for which defendant applied, as a matter of comity and deference to this Court. However, he at the same time both (a) plainly intimated that this Court's construction of his decree herein was erroneous and (b) indicated a willingness to certify his opinion to this Court upon request in the manner now being developed for the consultation of State courts with respect to State law by Federal courts.

(a) *Indicated error in this Court's construction.* The most important passages appear in the following expressions of Judge Wyzanski at the hearing of May 28:

"THE COURT. But, I take it for granted, that the Department of Justice remains true to what it describes on the walls of its buildings with respect to its interest in having justice done as distinguished from merely prevailing. And I suppose you have no more doubt than Mr. Carson has as to what was my intention when I entered the Decree. Have you any doubt?

MISS BRASS [Attorney, Department of Justice]. We have no doubt, your Honor, at all.

THE COURT. Have you thought it fit to tell Judge Sheridan that you have no more doubt than Mr. Carson about what the whole nature of the proceeding was?" (Annex 1 p. 27)

"THE COURT. But don't you think Judge Sheridan might wrongly misconstrue your appearance hereby assuming that you thought that Mr. Carson was mistaken on his ultimate point as to how I looked at the matter when I decided it?" (Annex 1 pp. 27-8)

"THE COURT. . . . Now that you are here, are you not aware from being here on previous occasions that the government never contended, and I never ruled, as Judge Sheridan supposes the matter was decided? Are you not aware of that?

MISS BRASS. Well, your Honor——

THE COURT. I ask you as a lawyer, on your honor as a lawyer.

. . . .

THE COURT. I am just asking you, and I will hold it as a statement of your character as well as your competence." (Annex 1 pp. 28-9)

". . . I cannot understand how any person who was familiar with the whole course of this litigation could have any doubt whatsoever as to what had been my view of the conduct of the defendant, of the degree to which it had violated the Act and the degree to which the Decree was addressed beyond eliminating violations to setting forth a program of future conduct which would make it hereafter less likely that the violations could continue." (Annex 1 p. 39)

(b) *Suggestion re certification.* In this connection Judge Wyzanski said:

> "THE COURT: I have another question. If it be the kind of doubtful issue which a distant Court might desire to receive illumination on from the local Court, why could you not ask that distant Court to proceed in the manner which, as we now know the Supreme Court encourages Federal Courts to act with regard to State matters as to which the Federal Court may be uncertain as to how the State Court will decide it by getting a light in advance of a determination?" (Annex 1 pp. 22-3)

5. It is submitted that the foregoing passages make it perfectly clear that in the opinion of Judge Wyzanski this Court's construction of his decree with reference to the points stated in the notice of this application for new trial, is erroneous and not in accordance with the true meaning and intent of the decree, findings and conclusions—so much so that Judge Wyzanski expressed surprise and disappointment at Government counsel's having failed to concede this fact. The position of Government counsel, as the Court will note, was that——

> "I am not here today to argue the merits of the matter. I was instructed merely to make the point to your Honor, that this should not be entertained." (Annex 1 p. 29)

If this Court should be in any doubt concerning the significance of the language above quoted from Judge Wyzanski, then it is respectfully submitted that a formal remission of the pertinent questions to Judge Wyzanski is appropriate and is indeed necessary to avoid a miscarriage of justice. The language above quoted from the transcript

of May 28 indicates that Judge Wyzanski would act upon the appropriate inquiry from this Court. Moreover, this Court's attention should be called to the fact that plaintiff must have been guided by the thought of a deviant construction of the Government decree, in the choice of forum advised by counsel, since the fee application of counsel, undated but filed May 28, contains the statement (p. 7):

> "Legal services included . . . preparation of complaint and decision as to jurisdiction in which it was to be filed".

While plaintiff was perfectly entitled to select this Court as the forum for its treble damage suit, the Court's attention is invited to the fact that the choice cannot have been based upon convenience of the parties, and must have been dictated by questions as to the meaning of Judge Wyzanski's decree. As to the convenience of the parties the Court has too fully in mind to require detailing here the relevant facts; viz. trial counsel on both sides from New York, importation of the Southern District Court Reporters for the transcript, conduct of the trial for 12 days in the United States Court House for the Southern District of New York by special arrangement. As to the meaning and application of the decree on the other hand, this record shows that Hanover's counsel, when representing in 1954-5 National Shoe Manufacturers Association (of which Hanover was a member), had had experience with Judge Wyzanski's application of the decree. In particular, a partner of the firm representing plaintiff in conference with the defendant pursuant to decree par. 9 expressed the view that the outstanding or Form A leases had been declared by

Judge Wyzanski to be illegal (PX 79 p. 12). This statement not only was contradicted by defendant's General Counsel, Mr. Todd (PX 79 p. 14), but is also contrary to the view of his own decree held by Judge Wyzanski (110 F. Supp. at 344, 349, cf. Judge Thomsen's statement to that effect in the *Muskin* case 167 F. Supp. 106, 111).

Our inference would be that this Court was selected by Hanover counsel for this treble damage action in the hope that the decree would receive a more benevolent interpretation for plaintiff's purposes than it would receive at the hands of the author of the decree in the District of Massachusetts. This is what might be called legitimate "forum-shopping". Where however such great stakes turn on the proper interpretation of the Government decree, it is suggested that this Court should be peculiarly sensitive to the possibility of a misinterpretation here and should refer to the District Court of Massachusetts for its construction of the decree on the points here relevant.

6. The District Court of Massachusetts is the repository of the voluminous record and extensive exhibits in the Government case. It is impossible in the time available to bring to this Court's attention everything therein relevant to the construction of the Government decree which we had believed to be unambiguous. In support of this application, there are submitted two important points in the record of the Government case which were not heretofore brought to this Court's attention.

(a) *Combination of liability and relief in single trial.* References in Judge Wyzanski's opinion to matters of relief, like the sale of shoe machinery, are explained by the fact

that the Judge combined in the same trial matters affecting both violation and remedy. This is shown by the following passages from the record:

> "The COURT. I am going to explain why I am going to overrule that objection. In the hearings which are now being conducted, I am concerned not only with the question whether the defendant violated the law, but if the defendant violated the law, what is the appropriate remedy. The situation in the industry is important at least for the second of those two questions.". (November 20 1950, Tr. 3010-1)
>
> "The COURT. I would like to say to you from the beginning I have said this was a hearing upon remedy and relief, if any remedy and relief were allowed, as well as upon the question of liability or violation of the statute and though I am aware there are some Judges in recent years who have divided the proceedings into two parts as you suggest, that course has never been followed by the Judges for whose opinions and procedures I have the highest respect. I refer you to the practice followed by Judge Augustus Hand and Judge Learned Hand, sitting in the Southern District of New York as District Judges and sitting as specially assigned District Judges in other cases since they have been sitting on the Court of Appeals." (May 15 1951, Tr. 11723-4)
>
> "The COURT. . . . I am clear, despite Mr. Malloy's non-recollection, what I always said, there would be one trial and that I made it plain I would not hear in two stages the question of liability, if any, and relief, if any, and I cite the whole of the record for that." (June 20 1951, Tr. 13617)

(b) *Separate treatment of questions of machinery sale.* The fact that the sale of defendant's shoe machinery was taken up by Judge Wyzanski solely under the head of remedy, to operate *in futuro* only, is demonstrated in an extensive passage from the Government trial record, containing the Judge's summary of the case at Tr. 11725-36 on May 15 1951, which is attached to this affidavit as Annex 2. This analysis by Judge Wyzanski of the extensive record before him at that time clearly shows the separation of the sale question from other questions in the case, and shows the entirely *prospective* operation which the Judge had in mind for a requirement of sale of machines after liability should have been determined and subject to its being determined. This Court's attention is called particularly to the following language of Judge Wyzanski (Tr. 11734, 11735):

> "Now I pass to the third main division of the case, as I see it, and that is, suppose—and nothing more than suppose—that the Court should find that there was a monopoly prohibited by the anti-trust laws . . .
>
> The very difficult problem will arise of what the Court ought to do to bring about a competitive situation. . . . What would be the consequence of a situation in which the company was required to offer for sale every machine, but at its option the company was free to propose a lease upon economically equivalent terms?"

The fact that Government counsel themselves considered the question of sale of defendant's machines as a prospective

remedial measure, not dependent upon the determination of prior "culpability", is shown among other things by the following language used by Mr. Timberg, Government counsel, in the presence and hearing of Miss Brass in the closing argument on June 11 1952 (Tr. 14058):

> "The legality or illegality of an individual industry practice, standing by itself, is, from a relief standpoint, in a monopoly case, a matter of indifference. A fortiori, to devise a relief in terms of the gravity or the lack of gravity of the restraint of trade involved, is to inject into an equity relief proceeding issues of the type that I think both we and the defendants might want to exclude from consideration, to wit, issues relating to questions of punishment or punitive relief. Evaluation of moral or legal iniquity would obscure rather than clarify what I think this Court has referred to as the delicate and complicated economic issues raised by this case. The remedial relief for which the Government is contending is intended to give an economically justifiable resolution to an economic condition or state of affairs. Such remedial relief does not depend upon the evaluation of the gravity or culpability of the individual practices engaged in by the defendant, and is not geared into such an assessment or evaluation.
>
> In sticking to this remedial and non-punitive approach to the problem, incidentally, I am hopeful of being able to avoid such archeology of the case as does not illuminate or explain the present, to paraphrase Justice Jackson's language, and perhaps to supply some help to the Court in charting appropriate relief."

*Affidavit of Ralph M. Carson Read in Support of Motion for Partial New Trial*

WHEREFORE it is prayed that pursuant to Rule 59 a partial new trial be granted in the manner set forth in the annexed notice of motion, and that defendant have such other and further relief as may be just.

(Sworn to by Ralph M. Carson on June 9, 1965.)

**Annex 1 to Affidavit of Ralph M. Carson**

UNITED STATES DISTRICT COURT

DISTRICT OF MASSACHUSETTS

C. A. No. 7198 WYZANSKI, *D. J.*

UNITED STATES OF AMERICA

v.

UNITED SHOE MACHINERY CORPORATION

Hearing re:

APPLICATION FOR CONSTRUCTION OR AMENDMENT OF DECREE

Appearances:

Margaret Brass, Esq., Antitrust Division, Department of Justice, attorney for the plaintiff.

Robert Proctor, Esq. and Ralph M. Carson, Esq., attorneys for the defendant.

Breck P. McAllister, Esq., attorney for The Hanover Shoe, Inc. as amicus curiae.

Benjamin A. Trustman, Esq. and John R. Hally, Esq. attorneys for New England Association of Shoe Manufacturers, as amicus curiae.

Federal Building,
Court Room No. 6,
Boston, Mass.
May 28, 1965.

[2] The Clerk: Civil Action Number 7198, United States of America against United Shoe Machinery Corporation.

The Court: Good morning, gentlemen. All counsel from outside the Commonwealth are welcome to participate without any special motion or the like.

I have read, of course, all the papers which have been filed, and you may assume that I have given some thought to the problem. I will be glad to hear you in any order that seems appropriate. I should think Mr. Carson would want to speak first, and then, I suppose, the government and then, I suppose, some of the amicus curiae may or may not want to be heard.

Mr. McAllister: Your Honor, I have a brief memorandum.

The Court: I thought I had one from you. All right. I have a two-page something or other.

Mr. McAllister: I don't think you have this one, your Honor.

Miss Brass: You have a two-page memorandum from the government, your Honor.

Mr. McAllister: It is very brief.

The Court: I had some pleadings, Mr. McAllister. You had a petition to appear as amicus curiae.

[3] Mr. Carson: May it please the Court, in view of your Honor's not only having read but, I am sure, absorbed the papers I would not at this time, at least, unless your Honor has questions, reiterate the submission we have made in our application and in our brief, which was left in your Honor's chambers yesterday. I would rather at this time address myself to what I conceive to be the grounds of our position both in the government's brief and Mr.

McAllister's memorandum which are in substance that, as the government says, this Court should not entertain jurisdiction because Judge Sheridan had exercised jurisdiction or, as Mr. McAllister says, this is but a collateral attack on the judicial proceedings of another District Court on this decree, both of which perhaps add up to what may be in your Honor's mind, that the application is belated.

Why was it not made before? And I would like to address myself to that. It was not made before because this defendant from its knowledge of the record in the long case before your Honor could not conceive that that case tried out the rights of shoe machinery lessees, neither a party before the Court nor represented by the government. That case accused the defendant of monopolization, which is to say wrongful exclusion of its [4] competitors, shoe machinery manufacturers; and that, therefore, in your Honor's determination, as affirmed by the Supreme Court, there is primarily the element of prospective action, correction of what your Honor held to be a wrong or illegal business situation; and that at no time, express or latent in the record and decision was there a holding of a duty on the part of United to sell its machinery to its lessees before 1953 or 1955.

Now to our very great concern two of the machinery lessees did proceed to attempt to recover treble damages in other Courts on the basis of an implied or an adjudicated duty to sell. We resisted those.

One was in the Western District of New York. We would call your Honor's attention to the decision of Judge Burke in which he said, among other things, "The policy of lease only was not by itself illegal."

The other was the Hanover case. And the curious thing is they proceeded or they began in the same year, 1955. They

were upon allegations identical as to the complaints except for the names of the parties and the amounts involved. Coon as well as Hanover claimed a right of purchase and a duty to sell and invoked your Honor's decree in support thereof. And in the Coon case the Court held no such thing existed.

[5] Now this decision, which was rendered April 12, 1963, was called to the attention of Judge Sheridan, and it came down just before the oral argument in the Hanover case, which was May 2, 1963, and thus two years before the decision was filed. When the decision was filed, this was the first indication we had that a Federal Judge would take seriously the contention that your Honor's decree implied or perhaps determined a pre-1955 duty and obligation to sell.

This concerns us not only because the implications of such a decision pecuniarily are enormous but because of the peculiar eminence or authority given to this Court's decision by Section 5 of the Clayton Act under which our adversaries proceeded.

This, as your Honor knows, makes the final judgment in this case prima facie evidence against the defendant in any action or proceeding brought by any other party, that is by Hanover, as to all matters respecting which said judgment or decree would be an estoppel as between the parties thereto. That is to say, the judgment of this Court under the Clayton Act speaks as it were urbi et orbi to all Federal Judges entertaining jurisdiction under the treble damage clause.

Now Miss Brass' brief, citing the American [6] Securit case, is directed to the point that Judge Sheridan had jurisdiction. This we concede. The contention is unnecessary.

The question here is whether it is now right and fitting and, as we would submit, necessary that this Court exercise its interpretive power to determine the exact confines and bounds of the judgment, which is made by Act of Congress an estoppel between the parties. The American Securit cases, your Honor, are intriguing. We thought of dealing with them in our brief. We feel they are so much on our side I would like to deal with them orally, and your Honor has the citation in Miss Brass' brief.

Now I would draw, in line with what I have just said, this cardinal distinction between that group of cases and the issue before your Honor. The various plaintiffs concerned in those cases with the construction of Judge Kloeb's decree in the Toledo Glass case were suing for patent infringement. They were not invoking the special statutory sanctions of the Clayton Act, Section 5. Judge Kloeb's authority, as the Judge having jurisdiction by virtue of a consent decree, was not given that eminence and that control that Congress has given your Honor's judgment. Further, the Glass cases involved [7] the construction of a decree in a manner in which, while Judge Kloeb construed it, he declined to exercise an exclusive jurisdiction.

He said in 1958 Trade Cases, "The Court feels itself secure under its attempt to obtain the view of this Court as to the validity of its practices under the Consent Decree is properly here. It is doing what it had a right to do under the Decree. Maybe it can be criticized for not having done it eight years ago, but there was no occurrence at that time or since that time and up to the present time that would have caused it to come in here to seek a construction of the Decree." That is at page 74,489.

Then on the same page, he holds that his Decree is not violated by the package license practice that the petitioner

has followed. It is in that respect that other Courts quoting the Decree in haec verba point out that the Decree seems to prohibit that very practice, and for that reason they declined to allow the enforcement of the patents.

However, Judge Kloeb was asked in the same construction proceeding to assert an exclusive jurisdiction. At page 74,491 he recited the clause or the proposal that he should have sole jurisdiction to determine whether the [8] petitioner has violated the Decree, and he said, "I don't want to go on record as making any such statement as that."

Therefore, at the time these other Courts, in the Third Circuit, took the problem, they had not only the construction of Judge Kloeb but the refusal to attempt to exercise any authority with respect to the universality of that construction. Again I mention that by statute your Honor's judgment is given a certain universality.

The opposing brief has quoted Judge Leahy in the American Securit case, on the trial, and has terminated the quotation at the point on which I would particularly rely.

Judge Leahy says, at page 896 of 154 Federal Supplement, that the Ohio Court had refused to accept jurisdiction on certain other applications with respect to the Ohio Decree. It says that this Court now has confidence to test plaintiff's adherence to the obligation, and then it says, and this is quoted in the government's brief, "If the Decree is wrongly interpreted, or the consequences which flow therefrom are wrongly judged, the power rests with a higher body to set it straight."

This is the point urged upon your Honor by the [9] government and by Hanover as amici here. And, of course, there is power in the Third Circuit Court of Appeals, and it will be invoked, to endeavor to correct Judge Sheridan's interpretation of your Decree. But we feel we should be

blameworthy, if we did not bring the question here before judgment was entered, because I strongly suspect that my ingenious adversaries would say to the Third Circuit Court of Appeals, "If Judge Sheridan was wrong as a matter of interpreting Judge Wyzanski, why did not the defendant go to Judge Wyzanski while the case was still open?"

We are then here, and we point out in contra distinction from the passage I have just read and its application to this case the following two sentences which Judge Leahy thought important on page 896. He says, "The final judgment of the Ohio Court was not an adjudication of issues of fact or law in that action." In other words, it was a Consent Decree and not an adjudication made by the Master of the judgment.

He goes on, "It did not"—that is, the Ohio Decree—"It did not constitute evidence or admission of any such issue"—there again differing from your Honor's judgment—which constitutes evidence or admission of an issue by the very provision of the Act of Congress.

[10] I have called your Honor's attention to the recent decision of the Supreme Court as to the question of the right of construction or modification of an antitrust decree, and there again a Consent Decree, in the Columbia Artists' case where curiously enough the government took the position initially that it takes here before this Court. Here the government says that the application to construe should not be entertained by this Court. In the Columbia Artists' case the government said the Court had not jurisdiction and should not entertain the application to construe. Interestingly enough also the government in the Supreme Court treated the alteration in the Decree, which Judge Tyler had made, as a mere construction.

It said at page 5 of its Motion To Affirm, which has just been granted, "Despite some ambiguous expressions in the Opinions, the effect of the District Court's action is not to change the consent judgment when properly construed, and its Order does not constitute a modification."

The Supreme Court affirmed, that is six Justices, a majority, affirmed per curiam, without an Opinion. The minority of three, in the passage to which I have called your Honor's attention, treated the alteration in the [11] Decree by Judge Tyler as a modification and expressed some doubt as to whether it should be done in that way. I call that to your Honor's attention as indicating that whether our application be a modification, or called a modification, or truly an interpretation and construction of what your Honor has done, the way equally lies open to the government itself and it has found itself in a position to adopt either course.

I think now I can come to a very short reference, your Honor, a concluding reference to the equity and the grounds of this application. This plaintiff has been held, in the Opinion of the Middle District, to be entitled to enormous damages, as trebled, on the theory that this plaintiff had in the period under review by this Court a right of purchase of shoe machinery. In so far as that is an independent judgment and conclusion of the Middle District, of course, we cannot complain here.

The reason we are here is because we are convinced, and we have adduced the passages from the Opinion to your Honor in our brief, that the Judge in the Middle District has availed under the Clayton Act of language and perhaps holdings in your Honor's Opinion which it has misapplied in relation to the actual issues before the Court and to the record that was made, a very long record, [12] as your Honor knows so well.

This particularly comes out in the excerpt I have attached to our brief from the proceedings on the 101st Day, in which your Honor has outlined comprehensively for counsel the three issues before the Court, and treated the right to purchase or the duty to sell as the third branch that comes up at the end of all other branches, and as an expedient, if it be an expedient, to reduce defendant's market share.

There is no holding, we believe, nor an intention to hold, that the Court's condemnation of the lease-only system imported a correlative duty to sell in the pre-1955 period.

It is, of course, a little supererogatory to argue these points to the Court because your Honor really knows the inside and the intentions of this judgment and opinion. But as I read it and I invoke your Honor's determination, the condemnation of lease-only was tied in with all the elements in the lease, the four restrictive practices.

Your Honor's Decree, paragraph 4, singled out those four elements as means, and I don't say *the* means but means of monopolization.

It is a warping and a fragmentation of the [13] judgment to take lease-only separate from those means as an act of monopolization, which by inferential reasoning imports a pre-1955 duty to sell. I don't think your Honor intended so to hold. The proceedings in this Court indicate that it was not litigated.

And it is indeed surprising, and I think it should be more surprising to your Honor, who heard the witnesses, to be told at this stage by the Judge in the Middle District that the numerous shoe machinery lessees who came here and testified they were satisfied with the leasing system, and advocated its advantages, that these were people who

inferentially were being injured all the time by the refusal to allow them to purchase.

In fact, limiting myself to Judge Sheridan's opinion, which is before your Honor, I think I can say that Mr. Shepherd, the President of Hanover, had told United's counsel that he was willing to testify on United's behalf in the trial before your Honor. He was not called. We, of course, cannot say what he would have said, but he did not express, as Judge Sheridan relates the evidence, any objection to an inability to purchase at that time.

I believe from a reading of the record your Honor must have felt that as these witnesses proceeded across the stage the repetition and cumulation were [14] becoming a little burdensome, and I drew the impression from reading the evidence that your Honor may have thought the extreme satisfaction of the shoe machinery lessees as a class with the leases was an additional argument that the lease system had excluded competitors, that is shoe machinery manufacturers.

But I must say I was shocked and startled to have it held that these people who so testified were grievously wronged parties to the tune of the Hanover claim of $5,000,000.

I add a word about retroactivity. I cited in our brief Justice Cardozo's luminous language in the Great Northern Railway case, 257 United States, as to the power of the Court—I think it is 257 United States.

The Court: I am sure it is not 257.

Mr. Carson: It is not 257.

The Court: No. It may be 287 but he was not sitting at 257.

Mr. Carson: Your Honor has an admirable memory.

The Court: He was named after 280. That I am sure of.

Mr. Carson: This is a good deal like measuring time by the Ephesus of Diana. It was 287, sir. Thank you. He said, on the left-hand page, 354—I am going [15] to look at that (laughter)—it is 364; I got it in before your Honor that time—on the left-hand page, page 364, "In the exercise of equity, equitable powers, the Court has the right and it sometimes has the duty to limit its determination as to a change in decisional law to a prospective application." Then on the right-hand page, page 365, Justice Cardozo says, "There is the other doctrine, that a changed law as constituted by the new determination is thought by some philosophers to represent a Platonic view of the law as it always was."

Now your Honor had this defendant before him for many days. Your Honor's Opinion is full of expressions of commendation of its behavior in many respects, "honestly industrial, no predatory practices, no monopoly profits," and so on. In fact, at page 106 of the pamphlet Opinion, your Honor predicates the result, as I read it, on solely economic considerations. Your Honor said, "Probably few monopolies could produce a record so free from any taint of that kind of wrongdoing. The violation with which United is now charged depends not on moral considerations but on solely economic considerations."

Now to me that means that in reliance upon what Judge Hand did in the Aluminum case, in the development of the law, so lucidly explained in the Opinion, your [16] Honor is applying a changed rule, measured by economic values, to the conduct of this defendant, and since it is by economic values it is not a rule until your Honor declares it. Therefore, I think in all your determinations here is the proposi-

tion that they are prospective and not retroactive as to the measure, the quality of the defendant's conduct pre-1955. Here was ask your Honor so to declare in unmistakable terms. We do not know what other suits or what other need will arise.

We ask your Honor to declare by the amendment or modification we seek, or the construction we seek, that the Decree cannot be read both ways, as Judge Sheridan says, with respect to the crucial holding here.

I think, your Honor, I have perhaps gone farther than I needed, taking your Honor's time in traversing the field of controversy.

The Court: I know I cannot persuade you by a series of questions, Mr. Carson, but let me just see how far you really think that your argument reaches. You have flatteringly referred to the universality of this Court's Decree. Is it your view that if by mischance some misguided majority in the Supreme Court of the United States should ultimately affirm Judge Sheridan's Decree, I could still, in the face of their determination, [17] reinterpret my Decree and thus undermine them?

Mr. Carson: I would never ask your Honor to undermine even a misguided majority. But my answer is that we are here applying before judgment. There is no issue of res judicata. And if your Honor should grant the relief we seek, we should have to take it on a petition for rehearing to Judge Sheridan and thereafter it would be in the hands of that Judge, in the Third Circuit Court of Appeals and in the Supreme Court. We could not ask your Honor to act further.

The Court: If I understand it, the only universality I have is limited to action prior to the entry of the Decree by a Judge?

Mr. Carson: Yes, sir.

The Court: So that if you happened to come to me after Judge Sheridan had entered his judgment, it would be too late?

Mr. Carson: I would not say so, your Honor.

The Court: I thought you just said that.

Mr. Carson: I don't think I need to make that decision or cross that bridge. But I think that our claim would be much less strong if we came after judgment because then there would be a defense of res judicata with respect to the Hanover record. Here that does not [18] exist. The matter is still open.

The Court: Is it your opinion that very much is added by putting explicitly in a Decree the statement that the Court reserves the right to amend or make declarations or the like with respect to a Decree? Or is that not always inherent in an equitable Decree?

Mr. Carson: I understand it is inherent. But I think that the expression in Clause 23 of your Honor's Decree is an indication and a warning that the right is reserved and may be exercised at any time that is proper.

I must add that a similar reservation did occur in the Toledo Glass case, and the Third Circuit held it did not exclude their independent action. But I think I have stated the grounds that make that line of decision inapplicable here.

The Court: Well, Mr. Carson, if, as you indicate, and as, I must say, I had always supposed, my explicit statement really added nothing whatsoever to what was my inherent power, then I am moved to ask you whether you think in every equitable case, whenever it appears that some Court is likely to misconstrue the Decree, and the question comes up, either under a provision like the one in the Sherman Act, or the Clayton Act, to which you have

already referred, or comes up in [19] connection with the problem of res judicata, or in any other way in another Court, the first Court which entered the Decree which is drawn into question in the second Court can at that subsequent time reframe its words so as to make the controversy in the second Court narrower than it otherwise would be?

Mr. Carson: Certainly that we would so say with reference to treble damage suits under the Clayton Act, Section 5, which are ancillary to the main judgment. I might add that in a citation which I did not take the precaution to bring with me Judge Augustus Hand in the Second Circuit enjoined patent infringement suits in a related matter, a related matter before him, because, he said, "This Court, which sat initially in the case, can best protect the interests of everybody." I can furnish that citation. It is a partial answer to your Honor's question. You probably know it. This has been done in patent infringement cases. The United States Gypsum case, 352 United States, describes the basis of jurisdiction in that kind of situation.

So I think the answer to your Honor's question, even though it was broadly stated, is in the affirmative. I do rely on the express reservation. I think that is a warning for purposes of the Decree and its use outside [20] this District; that this Court has, in so far as it will exercise it, an interpretive power which can be exercised. I would suppose, your Honor, without undergoing the imputation of flattery, which I never like to do, that Judge Sheridan would welcome an expression from this Court on these points, if this Court has anything to add to its prior decision and Decree.

The Court: Mr. Carson, now to test this point. If by mischance, as far as I am concerned, I had died last week, is the privilege of construction a personal privilege

to the Judge who sat, or is it a privilege which inheres in the Court which rendered the Decree, so that your status to ask for this interpretation and modification would have been a life estate lapsing with my life?

Mr. Carson: I should not think it were a life estate, your Honor. I think it would inhere in the Court of original jurisdiction. But, of course, any interpretation favorable, or, I suppose, unfavorable to our application derives immense authority from the fact it comes from the author of the original Opinion.

The Court: Well, I am glad that it is a life estate ultra viv, but I don't quite understand why Judge Sheridan would pay much attention to Judge X, shall I say, [21] Morrissey, who succeeds me.

Mr. Carson: Well, here we get into the delectus personae.

The Court: I am only testing the theory.

Mr. Carson: I don't know that I could say anything about the successor Judge. But I should think that the Court which had the record, and which had exercised the jurisdiction, would have the theoretical power and control for purposes of chancery under the Clayton Act. I concede that a successor Judge who was as new to the record as Judge Sheridan initially was—in fact, he doesn't know the record yet—as new to the record as any other Judge would not have such great authority in the construction. The evidence is filed here. It is presumptively known here to all the Judges, a mere presumption. But your Honor is cognizant of the rule in the Emich case, which was a Jury antitrust case, where the Supreme Court said in interpreting for the Jury the effect of the verdict, the trial Court instructing the Jury may draw on the entire mass of the existing record in the Court of original jurisdiction. Now

that drawing on the entire mass as it were is much more easily done by the author of the Opinion. But I suppose it could be done by a successor Judge.

[22] The Court: Suppose that I, persuaded by your argument both as to my power and as to how it should be entered, did exactly what you want me to do, and Judge Sheridan, very politely, having read what I did, ignored me?

Mr. Carson: Your Honor, this is such a tempting and provocative situation that I entreat your Honor to put me in a position to bring it to pass. (Laughter) We can deal with that situation if your Honor follows our application. I cannot conceive for one moment that Judge Sheridan would decline to observe the limits of your Honor's decision. If we were not here and did not ask for this supplemental construction, I repeat that both he, and, above all, his superiors in Philadelphia, might well ask, "Why did not the defendant inquire from the Court sitting, because he reserved jurisdiction, and because the defendant was in that case with the government and was in a unique position to to do so."

The Court: I have another question. If it be the kind of doubtful issue which a distant Court might desire to receive illumination on from the local Court, why could you not ask that distant Court to proceed in the manner which, as we now know the Supreme Court encourages Federal Courts to act with regard to State [23] matters as to which the Federal Court may be uncertain as to how the State Court will decide it by getting a light in advance of a determination?

Mr. Carson: That certainly could be done, your Honor. First, of course, we have adopted a more direct and time-saving method. Second, in the example that your Honor has

given, the Supreme Court instructs the parties, as we are now doing, to remit the question to the State Court rather than addressing a communication direct to the State Court.

Therefore, I think that while that alternative might exist, it does not exclude the present alternative. I can well conceive that any Federal Judge, including perhaps your Honor, would not call formally on another Judge for an advisory opinion. That is what it would be.

I do think, however, we have an immediate and direct right to ask your Honor to rectify what we deem a great injustice.

The Court. Do you think I would look less favorably upon an advisory opinion than a corrective opinion.

Mr. Carson: I think so.

The Court: You do me great honor in believing me that humble. (Laughter)

Mr. Carson: I think your Honor would.

[24] The Court: All right. Thank you very much, Mr. Carson.

Mr. Carson: Thank you, sir.

The Court: All right.

Miss Brass: If your Honor please, I understood counsel to say that this was the first time that United had reason to think that a Judge might rule as Judge Sheridan did in the Hanover case.

I was smitten with the information which was contained in the brief that I received this morning from United, in which they said that they had been sued ten times, five times by the shoe machinery manufacturers and five times by shoe manufacturers. Two of those cases were settled and eight apparently went to trial. And yet, of these eight instances,

this is the first time United thought that a Judge might rule this way. I think the reason that this is the first time that United has sought a construction from this Court is not that at all but it is because for the first time there has been a judgment against United, which has granted damages, and it was in the process of losing the case, and all but a final Order has been entered. So for the first time United saw fit to come to this Court for a construction, because it thought that now it should seek a [25] construction which might aid it in that case and might seek to overturn Judge Sheridan's ruling.

We think this is belated, your Honor. We think that in the American Securit case, there is authority for this proposition. In that case Judge Steel made the comment, when it came to him, that he believed it was too late for American Securit at that point to be trying to secure a construction from Judge Kloeb in the Toledo Glass case, because it was nothing but a belated attempt to defeat the jurisdiction of Judge Leahy, who had already ruled upon the matter in the Delaware Court.

We believe that situation is analogous to this. As a matter of fact, your Honor, when it came up before the Circuit Court of Appeals in the Third Circuit, that Court was not very polite in what it said in its Opinion, because it ruled that Judge Steel had been correct when he had issued an injunction to American Securit to prohibit American Securit from going to Judge Kloeb with this issue.

So I would say in that case that this is contrary to Mr. Carson's argument. As a matter of fact, Judge Kloeb even recognized in his oral Opinion that there was jurisdiction in the Delaware Court.

[26] Now in this situation which is here before your Honor, this Hanover case has been in litigation for, I be-

lieve, ten years and during that entire time United had not seen fit to come before this Court until it found it had lost the case. We think this is a belated effort here. We don't think this Court should entertain this matter at all.

As we said in our little memorandum we filed with the Court, if United has been aggrieved by Judge Sheridan's Opinion, the appropriate legal remedy is available to it. It can appeal to the Third Circuit and, I am quite sure, it probably will. But to come before this Court at this time, when it never before sought construction of the Decree, we think is inappropriate, and we submit that the Court should not entertain this application.

That is all I intend to argue about it, your Honor.

The Court: Miss Brass, I have some questions to put to you. First of all, I want to say I am always glad to see you personally here and I am also glad to have the Department of Justice here more particularly since this is a case in which the United States is very definitely a party to the original proceedings and [27] obviously concerned about any matter of a possible modification of a Decree.

Miss Brass: Yes, your Honor.

The Court: But, I take it for granted, that the Department of Justice remains true to what it describes on the walls of its buildings with respect to its interest in having justice done as distinguished from merely prevailing. And I suppose you have no more doubt than Mr. Carson has as to what was my intention when I entered the Decree. Have you any doubt?

Miss Brass: We have no doubt, your Honor, at all.

The Court: Have you thought it fit to tell Judge Sheridan that you have no more doubt than Mr. Carson about what the whole nature of the proceeding was?

Miss Brass: Your Honor, until we received this application a few days ago, we had no reason to assume that this issue was even going to arise. We had no notice whatsoever that this was going to be filed before your Honor. There has been no occasion for us to appear before Judge Sheridan.

The Court: But don't you think Judge Sheridan might wrongly misconstrue your appearance here by [28] assuming that you thought that Mr. Carson was mistaken on his ultimate point as to how I looked at the matter when I decided it?

Miss Brass: Well, your Honor, I am not here this morning to argue the merits on the matter and I don't intend to. I merely came to point out to your Honor that we do not think this is an appropriate proceeding. We do not think your Honor should entertain it.

As a matter of fact, I am here to represent our interest, of course, as we always do have an interest in our judgments, but we do not feel that your Honor's judicial time should be taken up to duplicate what Judge Sheridan has already done in the Hanover case.

The Court: You have chosen to come here. I did not invite you. I am glad to see you.

Now that you are here, are you not aware from being here on previous occasions that the government never contended, and I never ruled, as Judge Sheridan supposes the matter was decided? Are you not aware of that?

Miss Brass: Well, your Honor——

The Court: I ask you as lawyer, on your honor as a lawyer.

Miss Brass: Your Honor, I do not read the [29] Court's decision as being different or being opposed to what Judge Sheridan has ruled.

The Court: Is that your testimony as a lawyer, Miss Brass?

Miss Brass: Your Honor——

The Court: Is that your testimony as a lawyer, that you would like to stand on before me, as being your best legal opinion?

Miss Brass: Well, your Honor——

The Court: I am just asking you, and I will hold it as a statement of your character as well as your competence.

Miss Brass: Your Honor, I can only say that I have read the decision as meaning that your Honor has found a violation of law covering the period of time which was charged in the Complaint. It had not occurred to me until I received these papers from United that it was in any way not what your Honor had done. I am not here today to argue the merits of the matter. I was instructed merely to make the point to your Honor, that this should not be entertained. I am not in a position to discuss the merits and I have not been instructed to discuss the merits, your Honor, and I would not be able to say what the official Department's view of this would [30] be under these circumstances.

The Court: I did not ask you that. Miss Brass, I will just say to you two things, which you may deem irrelevant. I commend Mr. Justice Brandeis' remarks made when he was Mr. Brandeis about Louis R. Gladys and his duty as an employee of the government, and with no humility I suggest you look at the letter I wrote about Miss Frances Perkins in The New York Times last week as to what constitutes high public service.

I am sorry that in response to my question to you as an individual as to what your view, based on your character and competence, was you so evaded my question. That is all I care to say.

Miss Brass: Your Honor, I do not feel that I have evaded your question. As I said, it never occurred to me until I received these papers the other day that there could be this interpretation of your Honor's decision. I have read it and I can see things in it which perhaps could be used by United to support its position. I have noticed other things in the decision which would support the other view. So I did not evade your Honor's question. I assumed and have always assumed that your Honor had ruled that there had been a violation for the entire period covered in the Complaint, and I [31] could, your Honor, point out in the decision portions thereof which, I think, would support that. That is the best answer I can give, your Honor.

The Court: No one who knows me will misunderstand the nature of my questions and comments even if on the jurisdictional ground I find it inappropriate to give the relief asked.

Miss Brass: Your Honor will recall perhaps that I was not here throughout the trial of this case. I perhaps am not as familiar with the record as——

The Court: Oh, Miss Brass, you were here frequently and are now handling a matter in connection with the reopening sought by the government of the Decree. Pleas of ignorance, like the other pleas you have made, go to the question of your character.

Miss Brass: Your Honor, I do not feel that my character is involved in this. I have given you a truthful answer, in so far as I can, of my interpretation of your Honor's Decree and your Honor's Opinion, which I have examined, and, as I say, I can see arguments that could be made either way from the decision itself as to what your Honor had in mind.

The Court: Does any amicus curiae wish to be heard?

[32] Mr. McAllister: Your Honor, very briefly.

The Court: I am glad to see you.

Mr. McAllister: I am here on behalf of the Hanover Shoe Company, which has been described here already. We appear really to question the propriety of this procedure. This is not an attempt, as we see it, to ask your Honor to construe or interpret or modify the final Decree that was entered here. There is no ambiguity about the language.

The defendant, it seems to me very obviously, is attempting to ask this Court to reach back and re-do its earlier opinion on the substance of the Opinion as to the violations and not as to the remedy that was found to be appropriate here.

I had promised myself that I would not get into the merits as to Judge Sheridan because I think it is entirely appropriate and suitable that this should be heard before the Court designated to hear it. It is interesting to get a preview of the argument that will be presented there. That is always very helpful, I am sure. But, frankly, your Honor, I am not going to enter into the merits of that.

We, of course, believe that Judge Sheridan treated the decision of this Court correctly in his case, [33] which was a treble damage case. We will so contend, of course, before the Third Circuit. We think it is very clear that Judge Sheridan proceeded with the utmost care. He took almost two years to render his Opinion. And I really think that when your Honor studies it, you will be struck by that.

But I am here, as I say, really to say that this is not a proper procedure, and is not an attempt to interpret the final Decree. That has been lived with very satisfactorily, I am sure, by the defendant, perhaps unhappily but satisfactorily. They are not asking for construction of language.

There seems to be no problem of enforcement of the Decree, of any of the usual considerations that would enter into an application of this sort. This is quite different. And I think it is perfectly obvious that it is different, and I shall not belabor the point.

Any error, if such there be, and we think there was none, will be before the Third Circuit in due course, your Honor. We ask that the application of the defendant should not be entertained and should be dismissed.

Thank you, your Honor.

The Court: Thank you, Mr. McAllister. Does anybody else wish to be heard? Mr. Trustman.

[34] Mr. Trustman: Your Honor, as long as we are in the courtroom, I think I should say that Mr. Hally and I are here as observers. We have considered between ourselves whether it would be appropriate for us to make a statement in connection with this application. We have also discussed the matter with counsel, who is in Washington, for the National Association. We appear only for the New England Association.

We have concluded on behalf of both Associations that it would not be appropriate for us to make a statement and take a position on this matter.

The Court: Is there anything else that anybody else wants to say?

Mr. Carson: Your Honor, could you just give me another minute?

The Court: Yes.

Mr. Carson: One of my opponents says that your Honor's Decree could be partly read one way and partly the other way. The other opponent says there is no ambiguity. It is your Honor's view we solicit.

The second point is—if your Honor cares to hear why the Hanover case took ten years to get up to this point—it is perhaps a sad history of judicial administration that after the suit was brought in the [35] Middle District the question of the passing on defense was presented to Judge Murphy for a preliminary trial under the appropriate rule by consent of the parties, and that took two and a half years, at which time Judge Murphy, not having decided the point, the Chief Judge appointed Judge Goodrich as a District Judge to hear and decide the point, which he did promptly, and an appeal was taken which was unsuccessful for the defendant.

And then Judge Murphy having died, and Judge Goodrich having died, the Chief Judge assigned the case to Judge Steel in Delaware, who then took the proceedings for about a year and made a few rulings, but then fell ill, and the term of his illness was so uncertain that the Chief Judge advised both parties that the case was available for reassignment to another Judge and he did then assign it to Judge Sheridan, who, after preliminary proceedings and the trial of twelve days, took two years after the last oral argument to render the Opinion filed April 28th.

Now in all that time we could not have had a reasonable expectation that a Court would come to a conclusion different from that of Judge Burke which, as I say, we tendered to Judge Sheridan, and whose decision is not even mentioned as such in the Judge's Opinion.

[36] Now my third point. I would like merely to note it in the record. Of course, your Honor knows it. Your Honor mentioned it—your jurisdiction. Jurisdiction is abundantly established, it seems to us, not only by the Columbia Artists' case, cited in our brief, but by the basic case, United States Gypsum, 352 U. S. 457, at page 464. The

majority in a divided Court said, "We think that whether Gypsum was barred from recovery, etc., was a problem sufficiently related to the rationale of the 1951 Decree to bring it within the reserve jurisdiction clause. This is especially so because patent misuse was the essence of the old antitrust litigation and its continuance or renewal were thus issues peculiarly within the province of the antitrust clause whose determination would avoid multiple litigation and possibly conflicting decisions on that issue among the Courts in which Gypsum had brought suit."

That, of course, was again a patent controversy. I merely mention again that our case is the stronger when the jurisdiction exercised is that which Congress has given by the Clayton Act certain superior authority and force.

The Court: Since you rose the second time, Mr. Carson, and called to my attention the delays which have occurred—I had thought of reserving my decision—[37] but I think there would be no use, except from the point of a perhaps more elegant expression of my views, for me to delay.

I deny the application made by United Shoe Machinery Corporation. But I deem it appropriate expressly to call attention to the full range of the colloquy which preceded my ruling as well as briefly to summarize what seemed to me to be the determinative considerations.

I shall not address myself to the technical question as to whether by virtue of the terms of the Decree or indeed by virtue of the inherent powers of an Equity Court I do have jurisdiction, and in that sense power, to grant the relief which has been requested.

It seems to me sufficient for me to say that, if I do have the power, in this particular case I, as a matter of discretion, would not exercise it.

In the first place, this application comes rather late with respect to the particular Hanover Shoe Company litigation and also with respect to other litigation raising many of the same questions. I am not sure whether it would have been desirable for the parties before another District Court to have suggested that the parties might have applied to me for a [38] construction of my Decree but in any event no such proceding was begun. Now the situation is one in which an able and respected United States District Court Judge has written an Opinion; and, although he has not yet entered a judgment, the Opinion bears on its face full evidence of the careful consideration which he gave to the points now brought to my attention. I have that regard for Judge Sheridan personally and for the Court on which he sits to be loath to intervene at this stage in a way that at any rate the general public would assume to be a kind of review of his action, and indeed, if I decided as I am asked to decide, an undercutting of his position. There are available remedies by way of appeal certainly to the Court of Appeals for the Third Circuit; and if by any chance that Court should affirm the Decree of the District Court, this would appear to be the kind of case in which the Supreme Court of the United States might well indulge its power to grant a petition for certiorari.

There are very grave difficulties in the method of proceeding which I am asked to follow in the application before me. Already I have pointed out that although the application obviously hopes to elicit my personal recollection and understanding and intention, the application, if [39] sound, would seem also to lie even were I no longer a sitting Judge, and the relief sought were asked from this Court then being presided over by a successor Judge whose sources

of information and capacity might well not equal those of the distinguished District Judge who has already heard the Hanover Shoe case.

I regret that the Department of Justice through its representative called upon in this situation to be recorded as other than present. Naturally the Department of Justice and the government are interested in a Decree in which the United States is a party but I cannot understand how any person who was familiar with the whole course of this litigation could have any doubt whatsoever as to what had been my view of the conduct of the defendant, of the degree to which it had violated the Act and the degree to which the Decree was addressed beyond eliminating violations to setting forth a program of future conduct which would make it hereafter less likely that the violations could continue.

The sought for relief is denied on the ground that the Court in its discretion determines not to exercise any power it might have, if it has any.

*Annex 1 to Affidavit of Ralph M. Carson*

[40] **Certificate**

I, Charles T. Duffey, official reporter, United States District Court, do hereby certify that the foregoing transcript, pages 1 through 39, inclusive, constitutes to the best of my knowledge, skill and ability a true and accurate transcription of my shorthand notes taken in the above-entitled case.

CHARLES DUFFEY

**Annex 2 to Affidavit of Ralph M. Carson**

Dean Edward S. Mason's article in a recent number of the Harvard Law Review which raises many very difficult problems in connection with this case.

I also have observed certain of his remarks in Chapter 1 on Profit, especially Part 3 thereof, and his remarks in Chapter 7 on Basic Pricing, and Chapter 8 on Product Line Pricing, and Chapter 9 on Price Differentiation.

I would anticipate no better use could be made by the Government and by the corporation of its time in the next week than to read very carefully the documents of which he is the author and to which he had previously subscribed, and I call to your attention also the fact that he was a co-editor of the American Economic Associates readings in the social control of business and that his knowledge was extensive obviously, in certain aspects of the shoe industry as well as machinery industry, and extends at least into the related field, from a machine point of view, certain aspects of the textile industry. He is the author of a study involving hosiery machines in 1941 published by the University of Chicago and I am very anxious that he be amply tested in connection with what seemed to be three of the outstanding divisions of this case, what seemed to me the big divisions.

First, if I may point out, obviously the answer to one may make it unnecessary to answer the second and the answer to one and two may make it unnecessary to answer the third.

The first question in the case is, is there a prohibitive monopoly? I intend to include within that, is there a prohibitive intent to monopolize, even if monopoly hasn't been achieved?

The second main division, it seems to me is, if the answer to one is in the affirmative, how was that monopoly

achieved? And assuming that the answer to Question No. 1 is in the affirmative, the third division would be, what should a Court do in order to eliminate the monopoly and restore competitive conditions?

The economist who is to testify is obviously expert in many of the problems that are presented in those three divisions. Whether he is called to testify broadly or whether he is called to testify narrowly, I think he had better be prepared for a rather wide range of questions, in particular in regard to Division No. 1, one of the economic questions which I think needs to be analyzed is, what is the field with which an economist would say we are here dealing? Is it appropriate, from an economist's point of view, to treat each machine type as involving a separate field? Is it appropriate to group machines together? Is it appropriate to regard as the field the whole field of shoe machinery or may there be, from an economic point of view, limitations upon that so as to exclude, for example, the type of machines used in the upper fitting room or the type of machines used in the cement process.

I am not trying to answer the question; I am trying to say that it is an economic as well as a legal question as to what is the field in which it is claimed that one determines whether there is or is not a monopoly.

Then, related to this first division is the problem of what is, in an economic sense, a monopoly. Is it true, from an economist's point of view, that a share of the market, no matter how large, is itself the proof of a monopoly? Or, on the contrary, is a share of the market a mere indicium or piece of evidence which, together with other evidence, is used to determine whether there is what an economist would call a monopoly which I assume, though

I cannot not to assume it to be the power to control price and production.

In connection with the power to control price and production, I would like to know what an economist understands that really means, tested against particular instances in this case.

I pass over many other difficult questions which seem to me to be legal in character rather than economic in character and I deliberately avoid the difficult problems which are presented by a lawful monopoly existing as the result of a patent grant.

It may be that an economist is competent to testify as to the effect of an aggregate of patents; I do not say he is or he is not. I will wait and see until the questions are put.

Going now to the second large division of the subject, if one assumes that a monopoly is found, and nothing that I have said previously or say today is meant to indicate that I have a view as yet as to whether or not a prohibitive monopoly exists in this case, then we would come to the question as to how that position of dominance was achieved.

It seems to me everybody will agree that some of the elements were of one character and some of another; that, for example, the dominance of the company is to some extent undoubtedly attributable to practices which have previously been considered and approved by the Supreme Court of the United States.

There can be no question that the dominance of the company is a result of practices it has followed for a long period of time. I am not saying that is the only one and I am not saying that the fact the Supreme Court has previously approved those practices means that the present Supreme Court would take the same attitude or that this

Court is bound to follow the decisions of the Supreme Court at earlier stages. I am merely stating what seems to me a plain fact, that some of the causes of the company's eminence are in practices which have been approved.

Thus, for example, the consolidation of the various constituent companies is unquestionably one of the causes of the company's present position. It is equally clear in United States v. Winslow that problem was considered by the Supreme Court of the United States and as then constituted that Court accepted the opinion of Mr. Justice Holmes that that conduct was permissible under the anti-trust laws as then construed.

It is equally clear some of the eminence of the company is due to its business ability, its skill, its research—and its efficiency, though I am not saying how much efficiency or how little—but those are elements which obviously did contribute to the company's position.

Likewise, it is clear that some of the company's position is due to patents. I think the company would be the first to say that in the earlier years it had a larger number of patents which could be described as basic and now it has a larger number of patents which deal with more limited improvements.

The company would say that was to be anticipated in the light of a crowded art developing over a number of years.

No doubt the patent explanation is an explanation of part of the growth of the company; whether it is an explanation of its present position in the sense that it is an explanation of its day to day achievements might be more doubtful. I am not expressing an opinion.

The company might say that that was not important, and the company might rely upon the testimony which was

given by one of the Compo executives to the effect that he thought that patents did not stand in the way of any competitor's approaching by a different avenue the same result. I am referring to testimony given by Mr. Smith.

Or the company may take the position that the patents, while of some importance, are of nothing like the importance which the Government has occasionally said that they were, from the point of view of defensive, offensive and other competitive considerations which, in the Government's view, go beyond the original intended purpose of the patent grant.

Now, everything that I have so far referred to may be thought to involve questions more legal in character than economic in character. And I am not sure how far it is appropriate to put questions along these lines to Mr. Dean or any other expert. I have mentioned these considerations so that you would realize that I know, or I think I know, that the eminence of the company is attributable to many factors, some of which clearly are supported by some, if not all, cases in the Supreme Court.

To some extent, however, the company's position must be a result of its practices in connection with merchandising. To some extent, its position must be the result of leases, and of the particular types of leases here involved, these leases having special clauses which have attracted the specific attention of the Government in its pleadings, and in its prayers for relief. The leases also have in them, or have implied as annexes to them, rights to receive service, as well as rights to have the use of the machines, and this bundle or combination has been much discussed in the testimony.

I am not unmindful of the fact that these leases as they now stand seem to have been supported by a decision of

the Supreme Court of the United States in the cases which were before it on previous occasions. And nothing that I say is intended to deal with the legal contention that this Court is bound to follow, either as a matter of the law of the case, or as a matter of res adjudicata, or as a matter of precedent, the earlier determinations of the Supreme Court. Those problems would have to be dealt with in the legal argument.

But I am now considering the case as it lies, or will lie when an economist is on the stand. And I think it would be important for me to know to what extent the economist traces the present position of United to the form of the lease. How far does the economist think that specific provisions in the lease are contributory to United's present position? How far does the economist think the bundle is contributory to United's present position? How far does the economist think that these practices are practices which would more or less be inevitable in any event in an industry with the characteristics of the shoe machinery industry? How far does the fact that Compo has the same pattern indicate that the leasing pattern is a consequence of the industry? How far is it a question of Compo apparently following a leader? How far is it an unusual situation which can be explained only by a desire for market dominance?

I am not trying to answer these questions. I am trying to show what goes through my mind as to the value that an economist may have in dealing with this type of problem.

In addition to the general question of the form of the leases, problems have been raised about the terms of the leases. That is to say, the terms set for one machine have been contrasted with the terms set for another machine. When Professor Meriam of Harvard was on the stand,

he pointed out that corporations in many lines of business follow the habit of realizing different rates of profit from different types of products made by that corporation or those corporations.

As I understand the Government's view, it is that here the differences are so extreme as to the rates of profit and the surrounding circumstances are so plain that the Court ought to find that United has not followed a merely normal market practice but has disclosed a motive to monopolize. If the Government does so contend, there must be specific examples on which an economist who has shown familiarity with the literature of the subject on such a scale as Professor Dean has shown it, could help us.

There are other problems with respect to the affiliates of United, and here I am going to be very slow to indicate by specification the problems which arise. But it is quite plain that an argument could be addressed to me that all the affiliates do not stand on the same footing. There may be economic considerations with respect to one group of affiliates, and one type of product, different from other products. It may be that the degree to which an affiliate has already a control or a tendency to control a supply may be important, or it may not be so.

It may be that a quite opposite argument from the one that I have just been considering might be addressed to me. Perhaps it would be said that any company which had acquired so important a position as United has necessarily in every extension of its power into any field an advantage which the anti-trust laws would not permit. Something might be said about the gravitational pull of the central mass.

But that is an economic question quite as much as a legal question. Or at least, the economic question enters

into the legal question. And here again, it seems to me that a man of Professor Dean's eminence and experience could help.

Now I pass to the third main division of the case, as I see it, and that is, suppose—and nothing more than suppose—that the Court should find that there was a monopoly prohibited by the anti-trust laws, and suppose it should trace the growth of the monopoly to attribute something to the leases, something to affiliates, something to other practices, and should also attribute some of the growth to perfectly proper conduct, like efficiency, like research, like inventiveness, like progressiveness in the industry.

Suppose further that the Court should attribute some of the growth to practices specifically considered by the Supreme Court of the United States and concretely approved by it. I mean such questions as the original combination of the constituent companies.

The very difficult problem will arise of what the Court ought to do to bring about a competitive situation. First of all, I would want to know what in the view of an economist would be a competitive situation. I don't mean to have him decide my case, but these questions are questions on which a judge can be helped by expert testimony.

How far would the rooting out of a particular clause in the lease go to accomplish the aim? How detrimental would the rooting out of that clause be to the industry as a whole? And by the industry as a whole here, I mean to embrace the shoe machinery industry, the shoe manufacturing industry, and the wearers of shoes. What would be the economic consequences of creating a segregation in leases, so that the lessee had the option either to lease the machine free of service, or if the company chose to give it, to lease the ma-

chine with service? What would be the consequence of a situation in which the company was required to offer for sale every machine, but at its option the company was free to propose a lease upon economically equivalent terms?

What would be the effect upon the industry if orders were to be issued by this Court with respect to affiliates, subsidiaries, and those parts of the main enterprise of United which were not directly concerned with the manufacture of machines? What would be the effect on the competitive situation? What would be the effect on the efficiency of the industry as a whole, meaning the shoe machinery industry, the shoe manufacturing industry, and the ultimate consumer?

Now, I also ought to say, what would be the effect if the patents were to be subjected to licensing either on a royalty basis or free of royalties? How would it reduce, if at all, the monopoly position, if it exists, of United? How would it operate in connection with the industry as a whole?

Now, I need hardly say that I realize the program I have sketched is one that cannot be accomplished in a two hour examination. And somebody will tell me not in a two day examination. But I do believe that these issues are economic as well as legal issues in large part, and that an economist who has the training and background and authorship of Professor Dean is obviously peculiarly qualified. I don't suggest he is the best qualified.

Mr. Hall: I agree with everything you have said about Professor Dean. I wish you had been with us when we endeavored to persuade him to testify. In the first place, he did not want to testify, on account of his duties in Columbia University, but more especially on account of the health of his wife. And he said that he couldn't give an opinion

or make an investigation along all of the lines that your Honor has indicated.

I realize, of course, the experience that he has had, the books that he has written, and I can't prevent questions from your Honor or from the Government, but I want you to have this in mind, that he has chosen one branch of what I call the

**Supplemental and Amended Findings of Fact, Conclusions of Law and Opinion, as Amended**

Hanover submitted a recomputation of damages. United filed a response not only to the recomputation, but also to the bases for the damage calculations. Hanover filed a reply.

In reality, Hanover submitted two and one-half sets of calculations based substantially on the method described in part E. 1. Two sets of calculations consist of a computation for the 20 major machine types and a separate computation for the 37 lesser machine types. The third calculation, based on Hanover's historical lives, is a computation for only the 20 major machine types. The damages for the 37 lesser machine types to go with this half set were computed by first deriving the ratio of rents and royalties paid on 37 lesser machine types to the rents and royalties paid on the 20 major machine types. This ratio was then applied to the excess of computed net costs of leasing over computed net costs of ownership for the 20 major machine types, Hanover historical lives.

This method was clearly set forth in Hanover's final brief and proposed findings of fact and conclusions of law. United limited itself to a general attack on the calculations, and to items improperly included or excluded. This court adopted the average of three separate sets of damage calculations as reasonable, which included the one-half set for the 37 lesser machine types based on Hanover historical lives.

United now attacks the mechanics of the computation for the 37 lesser machine types and suggests another basis; that is, ascertain the ratio of Hanover's claim for the 20 major machine types on the Hanover historical life set basis to Hanover's total claim for the same machine types on the two other bases, and then apply this ratio to the total

claimed damages for the 37 lesser machine types on the other two sets which Hanover put in evidence, that is the Joel Dean lives and 15-year lives. In its reply Hanover did not comment on the merits of United's method but argued it was belated and that the court's figure should be retained as the starting point. If United's contention depended on the reception or consideration of additional evidence, this court would disregard its argument. In damage calculations of this type, however, the question is one of the reasonableness of the approach, in terms of relevant, informative and logically significant data, which can be determined from matters of record. Both the Hanover and United methods meet these criteria. United's method further refines the calculations and is the better one. Accordingly, the court accepts $1,812,965[16] in lieu of $1,830,640, as the starting point for the recomputation.

| | |
|---|---|
| Damages for 20 major machine types, Joel Dean lives (P-42 as amended by exhibits P-123 and P-50) | $1,630,239.86 |
| plus | |
| Damages for 20 major machine types, 15-year lives (P-37 as amended by exhibits P-123 and P-50) | 1,607,922.25 |
| = | $3,238,162.11 |
| Damages for 20 major machine types, Hanover historical lives (P-41 as amended by exhibits P-123 and P-50 and other service cost adjustment) | $1,577,189.25 |
| or a ratio of | .487 |

[16]Rounded to nearest dollar.

This ratio is then applied to the total damages for 37 lesser machine types, Joel Dean lives, and 37 lesser machine types, 15-year lives, to arrive at damages for 37 lesser machine types, Hanover historical lives, as follows:

| | |
|---|---|
| Damages for 37 lesser machine types, Joel Dean lives (P-46 as amended by exhibit P-123 and adjustments for service costs)[17] | $205,821.04 |
| Damages for 37 lesser machine types, 15-year lives (P-43 as amended by exhibit P-123 and adjustments for service costs)[17] | 213,509.52 |
| | $419,330.56 |
| | x .487 |
| | $204,213.98 |

The total damages for all machine types, Hanover historical lives, is thus:

| |
|---|
| $1,577,189.25 |
| 204,213.98 |
| $1,781,403.23 |

[17]The adjustments for service costs on the 37 lesser machine types are determined as follows:

| | | |
|---|---|---|
| Amended rental and royalty charges (P-46) | $ 348,026.52 | |
| Amended rental and royalty charges (P-42) | $2,133,777.05 | = .1631 |
| Amended service costs for 20 major machine types (P-50) | $ 101,803.04 | |
| | x .1631 | |
| Amended service costs for 37 lesser machine types | $ 16,604.08 | |

The $16,604.08, together with applicable adjustments shown on P-123 are deducted from rental and royalty charges as shown in P-46 and P-43 to arrive at a new computed net cost of leasing from which is deducted the computed net costs of ownership as shown in P-46 and P-43 to arrive at the damage figure.

The average of all the damage calculations is:

| | | |
|---|---|---|
| P-42 and P-46 as amended | $1,836,060.90 | |
| P-37 and P-43 as amended | 1,821,431.77 | |
| As computed above | 1,781,403.23 | |
| | 3/5,438,895.90 | = $1,812,965.30 |

The damage calculations include no claim with respect to the Sole Leather Dieing Out machine type and, therefore, the exclusion from damages for this machine during the period 1941-1955 is not necessary. For the remaining machines for which damages were ordered excluded, the following table shows the average amounts excludable from damages for the respective machine types.

| Machine | Leidesdorf No. | Period | Amount to be Excluded from Damage (averages) |
|---|---|---|---|
| Outsole Rapid Lockstitch Machine | 1 | 1939-1955 | $324,356 |
| Upper Leather Clicking Machine | 12 and 50 | 1950-1955 | 3,128 |
| Sole Laying Machine | 27 | 1951-1955 | 3,019 |
| | | Total | $330,503 |

The interest to be included in the damage calculations is $69,259.

*Summary of Damages:*

| | | |
|---|---|---|
| Average of all damage calculations | | $1,812,965 |
| Less damages for: | | |
| Outsole Rapid Lockstitch Machine | $324,356 | |
| Upper Leather Clicking Machine | 3,128 | |
| Sole Laying Machine | 3,019 | |
| | | 330,503 |
| Net average damages—all machines | | $1,482,462 |
| Less interest | | 69,259 |
| Total damages—to be trebled | | $1,413,203 |

In addition to matters related to the recomputation of damages, United and Hanover set forth several arguments, all of which were previously advanced and fully considered by the court. They will not be reconsidered.

## Application for Attorneys' Fees

Hanover was represented by the law firm of Donovan Leisure Newton & Irvine (Donovan), New York, New York, chief counsel, and Nogi, O'Malley & Harris (Nogi), Scranton, Pennsylvania. The recomputed damages of $1,413,203, when trebled, will result in a final judgment of $4,239,609. Donovan seeks a fee of 20 percent of the

damages recovered, or $847,992, together with $4,381.87 in reimbursement of necessary travel expenses, and Nogi seeks a fee of 3 percent of the damages recovered, or $127,188.

United concedes the standing of counsel, the magnitude and complexity of the litigation, the responsibility undertaken by Hanover's attorneys, the number of hours expended by counsel, the description of the proceedings, and the disbursements for travel. United contends that the requested fees are grossly excessive and not supported by enough evidence for the court to exercise its discretion. United points to the absence of evidence of the customary worth of counsel engaged, the necessity for the participation of eight lawyers, and the going rate for leading trial counsel in the Middle District of Pennsylvania.

The fixing of attorney's fees is within the discretion of the trial court, reasonably exercised. Some of the factors considered are: (1) whether plaintiff's counsel had the benefit of a prior judgment or decree in a case brought by the Government, (2) the standing of counsel at the bar—both counsel receiving the award and opposing counsel, (3) time and labor spent, (4) magnitude and complexity of the litigation, (5) responsibility undertaken, (6) the amount recovered, (7) the knowledge the court has of the conferences, arguments that were presented and of work shown by the record to have been done by attorneys for the plaintiff prior to trial, (8) what it would be reasonable for counsel to charge a victorious plaintiff. Noerr Motor Freight, Inc. v. Eastern R. R. Pres. Conf., E. D. Pa. 1958 166 F. Supp. 163, *aff'd,* 3 Cir. 1959, 273 F. 2d 218, *rev'd on other grounds,* 1961, 365 U. S. 127.

This case was one of great magnitude and complexity. There was a separate four-day trial of the passing-on issue. Hanover prevailed in the district court and in the court of appeals and certiorari was refused by the Supreme Court. Counsel, in the preparation of its case, and in meeting the highly competent and skilled defense of United, was required to prepare numerous briefs and legal memoranda on issues which were novel or which had not been authoritatively settled. The theory of damages was necessarily complex in view of the monopoly and the need for Hanover to meet the standards necessary for an acceptable damage calculation. To accomplish this, counsel had to collect, through numerous requests for admissions, depositions and interrogations, detailed factual data in support of its claim and reply to the defenses. This was a particularly big job in view of the number of machines involved and the period of time—sixteen years—of the damage period of this action. Some of the interrogatories were met with objection with a consequent need for argument and decision. United also availed itself of discovery which in some cases met with objections from Hanover. Fifteen days were spent in taking depositions at various places throughout the country. Much of this data was assembled with the help of certified public accountants and others with whom numerous conferences were necessary. There were several pretrial conferences. The trial lasted 19 days. The record consists of 2,553 pages, exclusive of the closing arguments. Hanover offered 124 exhibits. Many of these were voluminous and without question their preparation required extensive work. United offered 87 exhibits. Counsel for Hanover submitted extensive briefs, reply briefs and proposed findings of fact and conclusions of law.

The proceedings attest to the great responsibility undertaken by counsel. The amount recovered is substantial. Subsequent to the decision in this case and while damages were being recomputed, counsel appeared before the United States District Court for the District of Massachusetts to argue against a belated application for reconstruction of the Government decree, and then appeared before this court to argue against an application for a rehearing based upon the colloquy that transpired in that court. Counsel on both sides have pointed to the uniqueness of many features of this case. In view of these matters, "customary charges" and "going rates," presumably for ordinary litigation, would be of little weight in determining the amount of compensation to be awarded.

The greater part of this effort and time was expended by Donovan. It is conceded that Nogi, whose participation and responsibility was on a lesser scale, actively participated in many aspects of the litigation. It aided in pretrial preparation; participated in numerous pretrial and trial conferences, reviewed pleadings, briefs, and memoranda; participated in all court sessions, and was on the briefs in the appeal of the decision related to the passing-on issue. Total time devoted to this case, all by a senior partner, was 950 hours.

In view of these matters this court finds that attorneys fees of $600,000 to Donovan and $50,000 to Nogi are reasonable. The cases have devised various standards for testing the reasonableness of the fees awarded in terms of percentages and rates per hour.

The fee to Donovan amounts to about 42.5 percent of simple damages and less than 15 percent of the treble damages. These percentages are in line with fees awarded in

recent antitrust cases.[18] At United's insistence Donovan produced its fee arrangement with Hanover. Under this,

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[18]In note 3 of Bal Theatre Corp. v. Paramount Film Distr. Corp., N. D. Calif. 1962, 206 F. Supp. 708, there are collected a number of cases, to which this court has added, which show the following:

| Case | Damages (trebled) | Fee Award | Percent |
|---|---|---|---|
| Twentieth Cent. Fox Film v. Goldwyn, 9 Cir. 1964, 328 F. 2d 190 | $ 300,000 | $100,000 | 33.33 |
| Union Carbide and Carbon Corp. v. Nisley, 10 Cir. 1962, 300 F. 2d 561, 587; reversed trial court on issue of damages, but approved 15% of amount recovered as attorneys fees | $4,400,000 | $500,000 | 11.36 |
| Sunkist Growers Inc., v. Winckler & Smith Citrus Prod. Co., 9 Cir. 1960, 284 F. 2d 1, 4; reversed on other grounds, 1962, 370 U. S. 19 | $1,447,500 | $195,000 | 13.47 |
| Darden v. Besser, 6 Cir. 1958, 257 F. 2d 285, 286; attorney's fee increased from $10,000 to $30,000 by Court of Appeals | $ 135,000 | $ 30,000 | 22.22 |
| Clapper v. Original Tractor Cab Co., 7 Cir. 1959, 270 F. 2d 616, 626 | $ 82,824.05 | $ 25,000 | 30.18 |
| Twentieth Century-Fox Film Corp. v. Brookside Th. Corp., 8 Cir. 1952, 194 F. 2d 846, 858; the Court of Appeals reduced the attorney's fee from $150,000 to $100,000 | $1,025,000 | $100,000 | 9.76 |
| Milwaukee Towne Corp. v. Loews, Inc., 7 Cir. 1951, 190 F. 2d 561, 569; the Court of Appeals reduced the attorney's fee from $225,000 to $75,000 and also reduced the award of treble damages from $1,295,878.26 to $941,574.30 | $ 941,574.30 | $ 75,000 | 7.97 |

counsel was to receive 20 percent of the recovery, whether by trial or settlement. United points to the lack of evidence to show the need for the number of lawyers who were engaged in this case, and consequently, the hours spent. Since this court has arrived at the fee award on bases other than the number of hours, the lack of such evidence is not significant. Counsel have submitted figures, which are not disputed, which show that partner hours totalled 4,849 and associate hours totalled 6,574, for a grand total of 11,423 hours. If we assume that associate time is worth half as much as partner time, then the fee awarded would reflect a partner rate per hour of about $74.00 and an associate rate per hour of about $37.00.[19]

Due to Nogi's limited participation the percentage of fee to the total award is not meaningful.[20] Rule 3 of the rules of this district provides that non-resident attorneys, such as Donovan, shall have associate counsel from this

| Case | Damages (trebled) | Fee Award | Percent |
|---|---|---|---|
| American Can Co. v. Bruce's Juices, 5 Cir. 1951, 187 F. 2d 919, 920 | $ 180,000 | $ 35,000 | 19.44 |
| Noerr Motor Freight v. Eastern Railroad Pres. Conf., E. D. Pa. 1958, 166 F. Supp. 163, 168 | $ 652,074 | $200,000 | 30.67 |

[19]The fee arrangement between counsel and Hanover provided that as a minimum counsel be paid $25 per hour. This rate is not significant here because (1) in view of the percentage arrangement, it looks primarily to an unsuccessful prosecution and (2) it was agreed to in 1955 when economic conditions differed and when counsel, no doubt, could not foresee the extent of this litigation.

[20]The fee awarded is slightly more than 1 percent of the trebled damages.

district. Among other things, this enables the court more easily to communicate with counsel and to have before it counsel who, as members of the bar of this court, are responsible to it. The Nogi firm, for the most part, had one man, senior partner Russell J. O'Malley, Esq., engaged in this litigation. The need for at least one man can hardly be questioned. In view of the complexity of this litigation, it is understandable that Donovan would choose counsel of experience and high standing. On the basis of the 950 hours devoted to this cause, Mr. O'Malley and his firm would be compensated at little more than $50.00 per hour. This is reasonable not only in view of Mr. O'Malley's participation in this case, but also because his representation prevented him from being productively engaged in his own practice.[21]

In support of the application for disbursements for necessary travel expenses, Donovan relies on Judge Wyzanski's opinion in Union Leader Corp. v. Newspapers of New England, Inc., D. Mass. 1963, 218 F. Supp. 487. In that case the court, in determining what would be a reasonable attorney's fee, took into account the number of hours which would have been necessary to prove the claim, and necessary disbursements, including disbursements for accountants, of about $8,000, as relevant but not exclusive guides. The court did not allow the disbursements as a separate item

[21] While Donovan's fee arrangement with Hanover originally provided that Donovan would take care of the cost of local counsel if there were to be a recovery, this originally contemplated that local counsel from Hanover, Pa. would be engaged. Subsequently, it was determined that local counsel from Scranton, Pa., the situs of most of the proceedings, would be necessary. Accordingly, this part of the fee arrangement was orally rescinded and it was agreed that the cost of local counsel would be borne by Hanover.

of compensation or reimbursement. Allowance of accountants' fees as a separate item was expressly rejected in Twentieth Century Fox Film Corp. v. Goldwyn, supra, 328 F. 2d 190, at pages 223-4. The application for travel disbursements as a separate item of compensation or reimbursement will be denied.

Judgment for attorneys' fees will be entered in accordance with this opinion.

### Motion for a Partial New Trial, Etc.

Pursuant to Rule 59 of the Federal Rules of Civil Procedure and 28 U. S. C. A. § 1651(a), United filed a motion (1) for a new trial on the issues relating to the findings and decree in the Government case as described in this court's opinion; (2) for remission or certification of certain questions by this court to the United States District Court for the District of Massachusetts; and (3) for amendment of this court's findings of fact, conclusions of law and opinion and the entry of new findings of fact and conclusions of law directing dismissal of this action on the merits.

United contends that this court found that the lease-only system was condemned by Judge Wyzanski and that this court, in effect, found a legal duty to sell since the condemnation of lease-only implies as an inevitable logical alternative an obligation to sell; that in the Government case the lease-only system was not found to be in violation of the antitrust laws; that before the effective date of the decree there was no obligation to sell; that the reference to sale in the decree was remedial, and prospective only, with a view toward diminishing United's market power; and that these things being true, there is no basis for the decision

in favor of Hanover. United argues that these matters are apparent from the language of the decree itself and "does not require interpretation from the language of the opinion, findings and conclusions"; from certain passages in the voluminous trial record in the Government case; and from indications given by Judge Wyzanski in a colloquy preceding his denial on May 28, 1965, of United's application to the United States District Court for the District of Massachusetts, to construe or amend the decree in the Government case in accordance with United's contentions.

These contentions were urged upon and considered by this court prior to its decision. If this were merely an attempt to reargue these matters, the motion would be dismissed. United, however, in its motion affidavit has brought to the attention of this court for the first time certain passages in the Government case and in the colloquy. Hanover has not raised the question of whether this motion is properly brought pursuant to the "All Writs Act," 28 U. S. C. A. § 1651, or whether it conforms to Rule 59.

This court found that in the Government case the court held that United had monopolized trade in shoe machinery during the statutory period; and that the lease-only system was a monopolistic practice by the aid of which United maintained its monopolistic position. This court then concluded that United had a duty to abandon that policy or, to put it in another way, to refrain from illegal trade practices.[22]

There is nothing in the decree itself which compels a different conclusion. Judge Wyzanski did not hold, as United contends, that United monopolized the shoe ma-

[22]See, for example, pp. 12-17, 26-27, 38-39, 43 and 85.

chinery trade by the restrictive clauses and administration of the service clause. Rather he made a general finding that United monopolized the shoe machinery trade and commerce among the several states. He then described the lease clauses as practices which "are declared to have been means whereby defendant monopolized the shoe machinery market." But he did not say these were "the only" means or even "the" means. Yet United would have this court stop with this language, and ignore the rest of the decree. It is a familiar rule that in construing a document, a section should not be read in isolation from the whole. Cf. Richards v. United States, 1962, 369 U. S. 1, 11; Ideal Farms, Inc. v. Benson, 3 Cir. 1961, 288 F. 2d 608.

United argued in its brief on the merits, and now on the basis of passages from the record in the Government case, that Judge Wyzanski, both in his approach and in his findings, conclusions and opinion, separated the sale question from other questions. It calls attention to the language in the opinion designated "Opinion on Remedy." Even if it were clear that Judge Wyzanski intended to sectionalize his opinion, there is convincing language in the sections on "Effects of the Leasing System" and "Opinion on Alleged Violations" to support this court's construction.[23]

Judge Wyzanski's remarks during the May 28, 1965, colloquy also do not compel a different conclusion. In denying United's application from the bench Judge Wyzanski said that if he did have the power to grant the requested relief, he would not do it because the application was too late both with respect to Hanover and to other litigants. He also said he was loathe to take any action which could result

[23]See footnote 3, supra.

in an undercutting of the decision of another district court. He noted the remedies available by way of appeal and also the doubtful question of his power to act.

In denying the application, however, Judge Wyzanski said, ". . . I cannot understand how any person who was familiar with the whole course of this litigation could have any doubt whatsoever as to what had been my view of the conduct of the defendant, of the degree to which it had violated the Act and the degree to which the Decree was addressed *beyond eliminating violations* to setting forth a program of future conduct which would *make it hereafter less likely that the violations could continue.*" (Emphasis supplied.) This is a clear statement that the decree can be read retroactively and prospectively.

There is nothing in the colloquy to cause this court to change its construction of the decree, or to certify questions regarding its construction to the District of Massachusetts. The request is made belatedly not only to that court but also to this court. Even if this court were inclined to certify these questions to that court, this procedure should not be followed. The cases cited by United are distinguishable. The situation is unlike that in which a federal court withholds decision until a controlling issue of state law is decided by a state court. One sovereign is attempting to ascertain the law of another sovereign from the best possible source —the courts of the sovereign whose law is sought to be ascertained. The important thing is that the state court proclaims state law. This is not true here. As pointed out by Judge Wyzanski, if the application is proper, and if he were incapacitated, then some other judge of the District of Massachusetts should be asked to construe the decree merely because the opinion issued from that court.

This conclusion finds support in American Securit Co. v. Shatterproof Glass Corp., D. Del. 1958, 166 F. Supp. 813, *aff'd* 3 Cir. 1959, 268 F. 2d 769, *cert. denied* 1959, 361 U. S. 902, where the Delaware District Court had reached a decision based on the construction of a decree of an Ohio district court and thereafter enjoined American Securit, a party to that decree, from seeking a construction of the decree in the Ohio court. The Delaware court conceded that the Ohio court was peculiarly competent to construe the decree but pointed to the duplication of judicial effort and inconvenience and expense which would result if one party, after a decision has been rendered, is permitted to seek a different construction, especially where that party, being aware of his opponent's contentions, did not seek a timely construction of the decree. Subsequently, the Ohio court, without American Securit's participation and on its own initiative, construed its decree and reached a result different from that of the Delaware court. In affirming the judgment of the Delaware court, the court of appeals specifically noted that the author of the decree of the Ohio court construed it contrary to the Delaware court but said that it could not agree with this construction even though such construction was entitled to great weight. These same considerations apply here. While American Securit had chosen the Delaware court as the forum, this does not alter the result because Hanover had a right to choose this court as its forum, had obtained a decision, and should not now be required to relitigate the same matters.

One additional point requires brief mention. United stressed that a judgment of dismissal upon the merits was entered against W. B. Coon Co., a shoe manufacturer, and in favor of United in the United States District Court for

the Western District of New York, and the complaint therein was practically a copy of the complaint in the instant action. A review of the findings of fact in that case show Coon failed to introduce evidence that it would have purchased machines; that it had the means to do so; that it was dissatisfied with the leasing system; that United's acts caused damage to Coon; that lease prices were excessive; and that computed purchase prices and adjustments would have resulted in a fair and reasonable damage computation. Hanover's recovery is not based on excessive returns to United, and the other deficiencies in proof in the Coon case have been supplied.

The motion will be denied.

/s/ MICHAEL H. SHERIDAN
Chief Judge
Middle District of Pennsylvania

Dated: August 12, 1965.

**Order**

UNITED STATES DISTRICT COURT

FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

[SAME TITLE]

Now, this 12th day of August, 1965, the motion of defendant, United Shoe Machinery Corporation, pursuant to Rule 59 of the Federal Rules of Civil Procedure, for a partial new trial, is denied.

/s/ MICHAEL H. SHERIDAN
Chief Judge
Middle District of Pennsylvania

**Judgment**

UNITED STATES DISTRICT COURT

FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

[SAME TITLE]

This action came on for trial before the Court, Honorable Michael H. Sheridan, District Judge, presiding, and the issues having been duly tried and a decision having been duly rendered,

IT IS ORDERED AND ADJUDGED that the Plaintiff, The Hanover Shoe, Inc., recover of the Defendant, United Shoe Machinery Corporation, the sum of $4,239,609.00, with interest thereon at the rate of 6 per cent as provided by law, and its costs of action.

IT IS FURTHER ORDERED AND ADJUDGED that the plaintiff, The Hanover Shoe, Inc. recover of the defendant, United Shoe Machinery Corporation, attorneys' fees in the sum of $600,000.00 for the services of plaintiff's attorneys, Messrs. Donovan Leisure Newton & Irvine, and in the sum of $50,000.00 for the services of plaintiff's attorneys, Messrs. Nogi, O'Malley & Harris.

Dated at Scranton, Pennsylvania, this 13th day of August, 1965.

/s/ MICHAEL H. SHERIDAN
Chief Judge
Middle District of Pennsylvania

**Notice of Appeal**

UNITED STATES DISTRICT COURT

FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

[SAME TITLE]

SIRS:

PLEASE TAKE NOTICE that the above-named defendant hereby appeals to the United States Court of Appeals in and for the Third Circuit from the judgment herein dated August 13 1965, the findings of fact, conclusions of law and opinion herein filed April 28 1965, the supplemental and amended findings of fact, conclusions of law and opinion dated August 12 1965, and the order of this Court dated August 12 1965 denying defendant's motion for a partial new trial.

DAVIS POLK WARDWELL SUNDERLAND & KIENDL

By RALPH M. CARSON
A Member of the Firm
1 Chase Manhattan Plaza
New York, N. Y. 10005

WARREN, HILL, HENKELMAN & MCMENAMIN

By .....
A Member of the Firm
Scranton Electric Building
Scranton, Pa.
Attorneys for Defendant

Dated: Scranton, Pa.
August 20 1965

*Notice of Appeal*

To:

THE CLERK OF THIS COURT

MESSRS. NOGI, O'MALLEY & HARRIS
Miller Building
Scranton, Pa.

MESSRS. DONOVAN LEISURE NEWTON & IRVINE
2 Wall Street
New York, N. Y.
Attorneys for Plaintiff

## Notice of Cross-Appeal

UNITED STATES DISTRICT COURT

FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

Civil No. 5395

THE HANOVER SHOE, INC.,

*Plaintiff,*

*v.*

UNITED SHOE MACHINERY CORPORATION,

*Defendant.*

Notice is hereby given that The Hanover Shoe, Inc., plaintiff in the above entitled action, hereby cross appeals to the United States Court of Appeals for the Third Circuit from the final judgment of this Court entered in this action on August 13, 1965, the Findings of Fact, Conclusions of Law and Opinion filed April 28, 1965 and the Supplemental and Amended Findings of Fact, Conclusions of Law and Opinion dated August 12, 1965, in so far as said final judgment and said Findings of Fact, Conclusions of Law and Opinions excluded from damages, as calculated and determined by the Court, the amount of $324,356.00, prior to trebling, relating to the Outsole

Rapid Lockstitch Machine for the period July 1, 1939-September 21, 1955.

Dated: Scranton, Pa.
September 10, 1965

NOGI, O'MALLEY & HARRIS
By s/ NORMAN HARRIS
Miller Building
Scranton, Pennsylvania

DONOVAN LEISURE NEWTON & IRVINE
By s/ BRECK P. MCALLISTER
2 Wall Street
New York, New York 10005
Attorneys for Cross-Appellants

To:

THE CLERK OF THIS COURT

WARREN, HILL, HENKELMAN & MCMANAMIN
Scranton Electric Building
Scranton, Pennsylvania

DAVIS POLK WARDWELL SUNDERLAND & KIENDL
1 Chase Manhattan Plaza
New York, New York 10005

**Opinion of the Court**

(Filed April 11, 1967)

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

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No. 15626

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THE HANOVER SHOE, INC.

*v.*

UNITED SHOE MACHINERY CORPORATION,

*Appellant.*

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No. 15627

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THE HANOVER SHOE, INC.,

*Appellant,*

*v.*

UNITED SHOE MACHINERY CORPORATION

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APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

---

Argued May 3, 1966

Before FOREMAN, GANEY and FREEDMAN, *Circuit Judges*

---

FREEDMAN, *Circuit Judge:*

This private antitrust action presents a number of important questions.

Plaintiff, The Hanover Shoe, Inc., is a manufacturer of shoes and a customer of defendant, United Shoe Machinery Corporation, a manufacturer and distributor of shoe machinery. In this action brought under § 4 of the Clayton Act (15 U.S.C. § 15) based on violations of § 2 of the Sherman Act (15 U.S.C. § 2) Hanover obtained a trebled damage judgment against United in the amount of $4,239,609, with interest, and an award of $650,000 for counsel fees. United appeals from the judgment on a number of grounds, and Hanover has taken a cross-appeal on the ground that there was not sufficient evidence to support the district court's rejection of one of its large items of damage.

THE PROCEEDINGS

Almost twenty years ago, on December 15, 1947, the United States brought a civil action against United in the United States District Court for the District of Massachusetts, under § 4 of the Sherman Act (15 U.S.C. § 4) to restrain alleged violations of §§ 1 and 2 of the Act (15 U.S.C. §§ 1, 2). Judge Wyzanski, who heard the case graphically detailed what he called the "prodigious length" of the trial. "[T]he hearings took 121 days and covered 14,194 pages of transcript and included the offer of 5512 exhibits totalling 26,474 pages (in addition to approximately 150,000 pages of OMR's [records concerning machines in shoe factories as of a certain date] and over 6,000 soft copies of patents) and 47 depositions covering 2122

pages. At the close of the evidence the Court asked for briefs, and requested findings of fact and conclusions of law. The Government offered briefs totalling 653 pages, and requests totalling 667 pages. United submitted briefs totalling 1240 pages, and requests totalling 499 pages."[1] On February 18, 1953, Judge Wyzanski filed an elaborate opinion in which he found that United was guilty of monopolization in violation of § 2 of the Sherman Act. *United States v. United Shoe Machinery Corp.*, 110 F.Supp. 295 (D.Mass. 1953). The Supreme Court affirmed on May 17, 1954 in a per curiam opinion. *United Shoe Machinery Corp. v. United States*, 347 U.S. 521 (1954).

More than a year later, on September 21, 1955, Hanover brought the present treble damage action against United in the United States District Court for the Middle District of Pennsylvania. By pretrial agreement the parties submitted for preliminary decision the defense that any excessive rentals charged to Hanover for shoe machinery would not constitute an injury to its business or property if the excess was passed on to its customers. After the hearing had been held on this issue the district judge died and Chief Judge Biggs designated Circuit Judge Goodrich in his place. Judge Goodrich summarized the complaint as charging that defendant, "as a result of its unlawful control of the market, has caused plaintiff . . . to pay excessive rentals for the lease of shoe machinery." He held as a matter of law that if United was guilty of monopolization and had charged Hanover excessive rentals, Hanover had a cause of action for the difference between what it was charged and what it could properly have been charged in the ab-

1. United States v. United Shoe Machinery Corp., 110 F.Supp. 295, 299 (D.Mass. 1953), aff'd, 347 U.S. 521 (1954).

sence of monopolistic practices. He also held that the injury occurred when Hanover was overcharged for the machinery and that since the cause of action arose at the moment the tort occurred, United would not be relieved of liability because subsequent events might have alleviated some of the ultimate consequences of the wrong, for these would not inure to the benefit of the defendant. Judge Goodrich certified that the case was appropriate for an interlocutory appeal under 28 U.S.C. § 1292(b), because the issue involved a controlling question of law as to which there was substantial ground for difference of opinion, and an immediate appeal might materially advance the ultimate termination of the litigation. *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 185 F.Supp. 826 (M.D.Pa. 1960). We affirmed in a per curiam opinion in which we rejected the claim that treble damages would result in a windfall to Hanover, stating that Congress had imposed this rigorous penalty and any modification was for it to make and not for the courts. *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 281 F.2d 481 (3 Cir. 1960), cert. denied, 364 U.S. 901 (1960).

After a subsequent trial without a jury, Chief Judge Sheridan on April 28, 1965 filed a comprehensive opinion holding that Hanover was entitled to recover treble damages for the excess of the leasing costs over what it would have cost to own the same machines had they been available for purchase. Damages were limited to the period beginning July 1, 1939 on the ground that any earlier period was barred by the Pennsylvania statute of limitations, and were awarded to September 21, 1955, the date the action was brought. *The Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 245 F.Supp. 258 (M.D.Pa. 1965).

Hanover's alternative claim for damages, that the leasing charges were themselves excessive, was rejected by the district court because the Government decree, on which Hanover relied, had made no finding that United's leasing charges were excessive. Hanover has not sought review of this ruling on appeal. On August 12, 1965 Chief Judge Sheridan denied United's motion for a new trial, and entered the judgment from which these appeals are taken.

## Acquiescence and Demand

At the outset United contends that Hanover acquiesced in its leasing system which helped Hanover to obtain high profits and gave Hanover special benefits such as the right to return obsolete machines and the free services of United's technicians on problems in shoe making. According to United, the absence of a formal demand by Hanover for the sale of United's shoe machinery is fatal to Hanover's claim.

The court below found that "Hanover has proved that as a consequence of United's monopolization it was unable to purchase most of the more important machines which it would have purchased had they been available." 245 F. Supp. at 287. This finding negatives any inference of acquiescence in the United leasing system. The finding in the Government case of the existence of the monopoly and of United's policy against sales, the participation of Mr. Sheppard, Hanover's president, in the effort of a trade association of which he was president to persuade United to offer more of its machinery for sale and Hanover's purchase of machinery from United when it first became possible to do so by virtue of the Government decree, sufficiently support

the finding by the court below and forbid our declaring it to be clearly erroneous.

The question remains, however, of the necessity of a formal demand for the purchase of machines during the damage period. On this issue the court below found: "Hanover never asked United if it could buy the lease-only machines. Neither did it protest its inability to buy. Mr. Sheppard testified that any such request would have been a 'foolish question.' This explanation does not seem unreasonable in view of the findings in the Government case and the evidence in this case." 245 F.Supp. at 280.

Hanover was, as the court below found, along with the entire shoe machinery industry, a "captive customer" of United. What the witness characterized as foolish amounts to a futile gesture which the law does not require. Hanover had been a customer of United in the leasing of machinery for many years. It was well aware of United's power as the supplier of machinery and of its policy against sales. In such circumstances it would be ironic as well as idle to require the victim of the monopoly to make an explicit demand the denial of which was implicit in the continuance of the monopoly. See *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 699 (1962).

INJURY

1. United urges that its leasing system did no injury to Hanover because Hanover's competitors were subject to the same practices which United uniformly imposed on all its customers. This is a remarkable proposition. It is founded upon the premise that harm done to a customer loses its injurious effect when similar harm is inflicted upon

other customers similarly situated. It would punish a partial wrong but absolve it if it is widespread and thus would reduce the antitrust laws to a moral imperative without realistic effect. There is no reason to relieve actual injury on a basis so unrealistic and undesirable. *Keough v. Chicago & Northwestern Railway Co.*, 260 U.S. 156 (1922) does not require us to do so. There a shipper sued several railroads for treble damages on the ground that they had by agreement among themselves fixed excessive freight rates. United relies on the statement by Mr. Justice Brandeis that the exaction of the alleged excessive rate, which had been approved by the Interstate Commerce Commission, might not have harmed the plaintiff because all other shippers were entitled to be put on a parity with him. What was involved in *Keough*, however, was a case of "plain repugnancy between the antitrust and regulatory provisions,"[2] for the plaintiff was held barred from invoking the original treble damages provision of the Sherman Act because he was limited to the remedy provided by §8 of the Interstate Commerce Act which conferred a right to untrebled damages where a carrier charged an illegal rate. The statement relied on by United plainly was dictum and was unnecessary to the decision in the case; it is not controlling here. See, e.g., *Commonwealth Edison Co. v. Allis-Chalmers Manufacturing Co.*, 335 F.2d 203, 205-6 (7 Cir. 1964); *Atlantic City Electric Co. v. General Electric Co.*, 226 F.Supp. 59, 65-66 (S.D.N.Y. 1964).

2. United also contends that Hanover suffered no injury from United's no-sale policy in the damage period

2. See United States v. Philadelphia National Bank, 374 U.S. 321, 351 (1963); Pan American World Airways, Inc. v. United States, 371 U.S. 296, 322 (1963), Brennan, J., dissenting.

because it could have obtained foreign machinery. The court below found, however, that the foreign machinery which was available was not aceptable to Hanover both because of its inadequate capacity and performance and the lack of available servicing and technical advice. 245 F. Supp. at 285, 286. We cannot say from the record that this finding is clearly erroneous.

3. United claims that Hanover was not legally injured because the leases were lawful and therefore no damage could result from them. The claim of legality of the leases is based on an abstract characterization, torn from the context of United's market control. Judge Wyzanski specifically held that the leases which United employed constituted a means of its monopolization of the industry. Since the leases, although valid as instruments conferring the right of possession on the lessee, were instruments of monopolization, their lawfulness in the abstract does not undo their character as weapons in the consummation of the monopoly: Neither *Bruce's Juices, Inc. v. American Can Co.*, 330 U.S. 743 (1947) nor *Kelly v. Kosuga*, 358 U.S. 516 (1959) are of aid to United. They refused to allow a party to a contract to avoid payment thereunder because the underlying contract violated the antitrust laws. This was because the antitrust laws do not provide such a remedy: "The Act prescribes sanctions, and it does not make uncollectibility of the purchase price one of them." *Bruce's Juices, Inc. v. American Can Co., supra* at 750. The court expressly recognized, however, that the appropriate remedy for injury resulting from a violation of the antitrust laws was a treble damage suit. What was said in those cases regarding contracts which are intrinsically or inher-

ently illegal related merely to the right to avoid payment thereunder and not to the remedy available for violation of the antitrust laws.[3]

4. United also claims that Hanover passed on to its customers the difference between what it paid to United in rentals and what it would have cost it to purchase the machines. The validity of a passing-on defense in this case was decided by Judge Goodrich in *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 185 F.Supp. 826 (M.D.Pa. 1960), aff'd, 281 F.2d 481 (3 Cir. 1960), cert. denied, 364 U.S. 901 (1960). United seeks to distinguish the effect of the decision because it was based on the assumption that the damage claim was for excessive rental charges, whereas the judgment below is based on the difference between the rentals charged and the reasonable cost of the machinery if Hanover had purchased it.

Even if we assume that Judge Goodrich's determination of the passing-on issue is not binding here, his reasoning, which we accept, extends equally to the present claim. As we have seen, he pointed out that the antitrust laws deal with a plaintiff at the moment of injury and do not look to subsequent events which may have reduced the impact of the wrongful conduct. The fact that Hanover might have recouped some of that damage later by increasing the prices of its shoes is irrelevant to the question of damage. We may, indeed, add that if United's claim

3. Turner Glass Corp. v. Hartford-Empire Co., 173 F.2d 49 (7 Cir. 1949), was a special antitrust case involving patents in which plaintiff conceded that it would not be entitled to recover unless the agreements were inherently illegal. In any event, to the extent that it would support United's claim that the leases must be inherently illegal to support an antitrust action for damages, we decline to follow it.

were accepted it would be difficult to apply the antitrust laws in a prosperous industry, where damages would readily be passed on to the consuming public. It would be contrary to the far-reaching social and economic purposes of the antitrust laws to afford release from their obligations to an economic wrongdoer because his victim in self-defense sought recoupment for the injury from the consuming public.

Our decision in *Freedman v. Philiadelphia Terminals Auction Co.*, 301 F.2d 830 (3 Cir. 1962), cert. denied, 371 U.S. 829 (1962), does not impair our rejection of passing-on as a defense by a violator of the antitrust law. There fruit brokers brought a treble damage suit for violation of the Robinson-Patman Act resulting from an improper terminal charge. The brokers had purchased the fruit at the defendant's auction on behalf of regular clients and the jury made a special finding that plaintiffs suffered no injury because they received a separate commission for their services, and their clients paid all the charges, including the terminal charges. In upholding the passing-on defense we specifically distinguished the case from the present one. Judge Kalodner, speaking for the Court, said: "Hanover affords no nourishment to plaintiffs' contention with respect to it. There the District Court in granting relief to the plaintiff premised its action on its fact-finding that plaintiff was a *consumer* and not a *middleman* and implicit in that distinction is its subscription to the doctrine enunciated in earlier cases that middlemen cannot recover damages where they suffer no injury by reason of their payment of proscribed charges." (p. 833). Moreover, the question of multiple liability is fundamental in determining whether the passing-on defense shall have

validity. See *Commonwealth Edison Co. v. Allis-Chalmers Manufacturing Co.*, 335 F.2d 203, 208-9 (7 Cir. 1964); *Atlantic City Electric Co. v. General Electric Co.*, 226 F.Supp. 59, 71 (S.D.N.Y. 1964). This explains the difference between the present case and *Freedman*. There it was the clients of the brokers who had the direct injury which would support treble damage claims against the auctioneer. Here, however, the injury to the customers who purchased the shoes which Hanover made with the machinery it acquired from United is too remote and its force too fragmentized and diluted to support a claim by the individual customers of Hanover.[4]

REMOTENESS OF INJURY

What has been said regarding the passing-on defense supplies in part the answer to United's contention that any damage that Hanover suffered is too remote and indirect to support a cause of action under § 4 of the Clayton Act, which requires not only injury, but also a causal relationship between the antitrust violation and the injury.[5] The court below found that "Hanover's injury flows proximately from the monopolization," and that by the leases United extracted "large sums of money in excess of the

4. Wolfe v. National Lead Co., 225 F.2d 427 (9 Cir. 1955), cert. denied, 350 U.S. 915 (1955), which United urges upon us, was specifically rejected by Judge Goodrich (185 F.Supp. at 831) whose opinion we affirmed.

5. "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

reasonable value of machinery and of the service rendered by United." 245 F.Supp. at 274. In this respect the case resembles *Chattanooga Foundry & Pipe Works v. City of Atlanta*, 203 U.S. 390 (1906), where it was held that injury was sufficiently demonstrated by the City's payment of more than the reasonable price of the defendant's pipes because of defendant's price fixing.[6] Here, as in that case, the cost to the customer of doing business was increased as a result of the monopolist's conduct. The consequences of the injury therefore were direct and the cause of action under the narrowest construction of § 4[7] was made out. In the context of the relation of machinery monopolist and customer manufacturer no more direct injury could be inflicted.

### Effect of the Government Decree as to the Lease-Only Policy

Section 5a of the Clayton Act (15 U.S.C. § 16a) makes the Government decree "prima facie evidence" against United in the present action "as to all matters respecting which said judgment or decree would be an estoppel as between the parties thereto."

Here the Government decree expressly declared that United's leases with any one of four specified restrictive

6. See also Georgia v. Evans, 316 U.S. 159 (1942).

7. It is unnecessary for us to consider whether the broad terms of the statute should be narrowed by construing § 4 to require that the injury be "direct," Karseal Corp. v. Richfield Oil Corp., 221 F.2d 358 (9 Cir. 1955), or whether a presumption of liability exists once injury has been shown, South Carolina Council of Milk Producers, Inc. v. Newton, 360 F.2d 414 (4 Cir. 1966); Note, Standing to Sue for Treble Damages under Section 4 of the Clayton Act, 64 Colum. L. Rev. 570, 586-88 (1964). See also Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690 (1962).

provisions—a term of ten years, a full capacity clause, deferred charges on return and non-segregation of repair and service charges—were means by which United had monopolized the shoe machinery industry. The decree does not contain any comparable declaration regarding United's failure to make shoe machinery available for sale. From this United argues that the Government decree is not prima facie evidence that its failure to offer shoe machinery for sale was illegal, since this is not a matter which was adjudicated in the Government case. For additional support it points to the fact that Paragraph 61 of the Government's complaint expressly alleged that United had refused to sell machinery, and urges that this was one of the "other charges of violation of the Sherman Act set forth in the complaint" which Section 2 of the Government decree declared "are dismissed with prejudice." On the face of the decree, therefore, United's contention is not lacking in merit.

United supports its contention by the claim that the courts are limited to the Government decree itself in determining the existence and extent of an estoppel under § 5a unless it is necessary to go beyond it to resolve an ambiguity in the decree. Such a construction of § 5a would seriously weaken its underlying policy of lightening the burden on private antitrust plaintiffs, who play such an important role in the implementation of the antitrust laws.[8] It is in harmony with that policy to give prima facie effect

8. See, e.g., Bruce's Juices, Inc. v. American Can Co., 330 U.S. 743, 751-52 (1947); Emich Motors Corp. v. General Motors Corp., 340 U.S. 558, 567-68 (1951); Radovich v. National Football League, 352 U.S. 445, 453-54 (1957); Minnesota Mining & Manufacturing Co. v. New Jersey Wood Finishing Co., 381 U.S. 311, 318-19 (1965).

to any fact which the findings or the opinion fairly show was actually adjudicated in the Government case.[9] To do otherwise would hamper on a technicality of form the policy of affording private antitrust litigants the fullest benefit of a successful Government suit. In *Emich Motors Corp. v. General Motors Corp.*, 340 U.S. 558, 568-69 (1951) the Supreme Court held that a criminal judgment was available to private litigants as prima facie evidence of "all matters of fact and law necessarily decided by the conviction and the verdict," since § 5a embodied a Congressional policy "to confer, subject only to a defendant's enjoyment of its day in court against a new party, as large an advantage as the estoppel doctrine would afford had the Government brought suit." This goes further than the use of the determinations which appear in the findings and opinion of the judge sitting without a jury in a civil case.

United would distinguish *Emich* on the ground that it rested on a general verdict of guilty which does not specifically indicate the nature of the jury's findings and that the conclusion in that case therefore was a result of necessity. The absence of any factual finding in a criminal verdict is no reason for holding that findings by a judge without a jury in a civil case are to be ignored because his decree is more elaborate.

We turn then for illumination to the elaborate findings of fact and opinion of Judge Wyzanski which accompanied the decree. A separate heading entitled "Effects of the Leasing System" in the findings of fact describes the

9. Under Rule 52(a) findings of fact and conclusions of law need not be isolated under such specific designations if they appear generally in the opinion of the court.

effect of United's leasing system as it worked in practice from the viewpoint of United, of shoe manufacturers and of potential and actual competitors of United. In dealing with the effect of United's leasing system on shoe manufacturers, there is a full appraisal of the advantages to the shoe manufacturer and note is made of the virtual absence of dissatisfaction with the system. Judge Wyzanski then went on to say: "However, while United's system has made it easier to enter the shoe manufacturing industry than to enter many, perhaps most, other manufacturing industries, it has not necessarily promoted in the shoe manufacturing field the goals of a competitive economy and an open society. Without attempting to make findings that are more precise than the evidence warrants, this much can be definitely stated." 110 F.Supp. at 323-24. There follow six consequences to shoe manufacturers if United's machinery were available for sale. Among these is the fact that shoe manufacturers who bought United's machines "would not be subject, as are those manufacturers who lease United machines, to the unilateral decision of United whether or not to continue or modify those informal policies which are not written in the leases and to which United is not expressly committed for any specific future period. . . . United's reserved power with respect to these matters gives it some greater degree of psychological, and some greater degree of economic control, than a seller of machinery would have." 110 F.Supp. at 324. In another category is this statement: "Some manufacturers who had bought machinery would find that financial and psychological considerations made them more willing than lessees would be, to dispose of already acquired United machines

and to take on competitors' machines in their place." 110 F.Supp at 324. These statements are reiterated in a form which shows that this effect was inherent in the lease-only system itself, and did not arise solely from the four restrictive features: "Yet as already noted, a shoe manufacturer may psychologically or economically be more impeded by a leasing than by a selling system. And this general observation is buttressed by a study of features in the United leasing system which have a special deterrent effect." 110 F.Supp. at 324.

Throughout his opinion Judge Wyzanski repeatedly stressed this distinction between the special obstacles to competition established by the four restrictive provisions in the United leases, and the general anti-competitive effects which flowed from the mere existence of a lease-only system. On the latter issue, he recognized the "magnetic ties inherent in [United's] . . . system of leasing, and not selling, its more important machines," and stressed that these ties, especially in the context of United's market control, fostered a sense of "partnership" among United and its customers which made it more difficult for another manufacturer of shoe machinery to take away part of the United market.[10] Moreover, he declared that the end of

10. "However, United's leases, in the context of the present shoe machinery market, have created barriers to the entry by competitors into the shoe machinery field.

"First, the complex of obligations and rights accruing under United's leasing system in operation deter a shoe manufacturer from disposing of a United machine and acquiring a competitor's machine. He is deterred more than if he owned that same United machine, or if he held it on a short lease carrying simple rental provisions and a reasonable charge for cancellation before the end of the term. The lessee is now held closely to United by the combined effect of the 10-year term, the requirement that if he has work available he must use the machine to full capacity, and by the return charge which can in practice, through the right of deduction fund, be reduced to insignificance if

the lease-only system would also increase competition by

he keeps this and other United machines to the end of the periods for which he leased them." 110 F.Supp. at 340.

"In estimating defendant's strength, this Court gives some weight to the 75 plus percentage of the shoe machinery market which United serves. But the Court considers other factors as well. In the relatively static shoe machinery market where there are no sudden changes in the style of machines or in the volume of demand, United has a network of long-term, complicated leases with over 90% of the shoe factories. These leases assure closer and more frequent contacts between United and its customers than would exist if United were a seller and its customers were buyers. Beyond this general quality, these leases are so drawn and so applied as to strengthen United's power to exclude competitors." *Id.* at 343.

"But United's control does not rest solely on its original constitution, its ability, its research, or its economies of scale. There are other barriers to competition, and these barriers were erected by United's own business policies. Much of United's market power is traceable to the magnetic ties inherent in its system of leasing, and not selling, its more important machines. The lease-only system of distributing complicated machines has many "partnership" aspects, and it has exclusionary features such as the 10-year term, the full capacity clause, the return charges, and the failure to segregate service charges from machine charges. Moreover, the leasing system has aided United in maintaining a pricing system which discriminates between machine types." *Id.* at 344.

"Furthermore, the creation of a sales market together with the purging of the restrictive features of the leases will, in combination, gradually diminish the magnetic hold now exercised by what United properly describes as the partnership features of the leasing system. As United's relationships with its customers grow feebler, competitors will have an enhanced opportunity to market their wares. . . .

"A further answer is that if the creation of a sales alternative to leasing is, as this Court believes, necessary to dissipate United's monopoly power, the Court should not withhold its degree because its effect is to allow competitors to copy United's designs." *Id.* at 350.

See Kaysen, United States v. United Shoe Machinery Corporation (1956), p. 275: "The most important single alteration in the operation of the shoe machinery market leading to an increase in the degree of competition therein is the end of the lease method of marketing, and the dissolution of the lease bundle which United provides under that method." See also pp. 193-94, 197-98, 276. Kaysen, an economist, acted as Judge Wyzanski's law clerk so that he could serve as an economic assistant on the United Shoe case. Kaysen's book is a reprint, with additional material, of the memorandum which he submitted to Judge Wyzanski after two years of research.

making available secondhand machines, which would promote a "substitute competition" and would make it possible for other manufacturers to study the United machines so as to experiment with alterations in them and to copy their unpatented features.[11] Finally, although he ordered United's leases to be purged of their restrictive provisions in the future, he also ordered United in Section 5 of the decree to offer for sale in the future any machine which it held out for lease. Judge Wyzanski thus justified this provision: "[United] has used its leases to monopolize the shoe machinery market. And if leasing continues without an alternative sales system, United will still be able to monopolize that market. To root out monopolization and to bring United, in the future, in the same class as its competitors, it is necessary not merely to place limitations upon United's leases, but also to require United to offer for sale any machine type which it leases. While, on its face, the decree seems to discriminate against United, in the context of the market situation created by United itself, the effect of the decree is to break down barriers erected by a monopolizer, so that, hereafter, there may be no wall between the class in which it is and the class in which its competitors are."[12] Rejecting the Government's suggestion that the decree require United to make its sales terms

11. 110 F.Supp. at 344, 349-50. See also Kaysen, supra, at p. 73: ". . . the absence of a second-hand machinery market, which is a consequence of the leasing system, is a substantial support to United's market dominance and is probably second in importance in its effect on United's market power only to the duration of the lease and the circumstances surrounding terminations of leases among all the aspects of the leasing system which affect that power."

12. 110 F.Supp. at 350.

more attractive to customers than its lease terms, the opinion states: "[I]t seems to the Court sufficient to direct defendant, if it offers any machine type for lease, to set such terms for leasing that machine as do not make it substantially more advantageous for a shoe factory to lease rather than to buy a machine." 110 F.Supp. at 351.

All this, we believe, demonstrates that the lease-only system itself was adjudicated in the Government case to be a means of monopolization. Read in the light of the policy of making the Government's decree fully available to the private antitrust plaintiff, Hanover is entitled to the benefit of the determination and United is estopped from questioning it. See *Emich Motors Corp. v. General Motors Corp., supra,* at 568.

THE RETROSPECTIVE EFFECT OF THE GOVERNMENT DECREE

The court below concluded that the adjudged violations were illegal from their initiation decades earlier, but it limited damages to the period within the statute of limitations as suspended by various tolling provisions. See 245 F.Supp. at 294, n. 15.

The Government decree, entered in the District Court in Massachusetts on February 18, 1953 and affirmed by the Supreme Court on May 17, 1954, prohibited United after "A-Day," which turned out to be January 1, 1955, from offering machines for lease unless it also offered them for sale. United urges that the decree was meant to operate only prospectively. In support of this view it points to the absence of any specific declaration in the decree that the lease-only system violated the antitrust law and maintains that the exclusive purpose of the decree was to break up United's market power in the future.

What we have already said requires us to reject the contention that the Government decree has no retrospective effect. For the remedial character of an equity decree does not necessarily imply that the conduct which it prohibits in the future was valid in the past. Decrees such as the Government decree are aimed at redressing the effects of antitrust violations in the future, and acceptance of United's contention would subvert the purpose of § 5a, for it would put an end to treble damage recovery by private parties in reliance on Government decrees, since they are prima facie evidence only in cases where the damage period is within the period covered by the Government case. *International Shoe Machinery Corp. v. United Shoe Machinery Corp.*, 315 F.2d 449 (1 Cir. 1963), cert. denied, 375 U.S. 820 (1963); *Dart Drug Corp. v. Parke, Davis & Co.*, 344 F.2d 173, 184-86 (D.C.Cir. 1965).[13]

This leads us to the question of the extent of the retroactivity of the Government decree.

Judge Wyzanski made vividly clear the extraordinary position of United in regard to the antitrust laws. Three times, in 1913, in 1918 and in 1922, United had been under the scrutiny of the Supreme Court. *United States v. Winslow*, 227 U.S. 202 (1913); *United States v. United Shoe Machinery Co. of N.J.*, 247 U.S. 32 (1918); *United*

13. There is no dispute that United machines leased by Hanover were unavailable for sale to Hanover before June 1, 1955, the date on which Judge Wyzanski approved United's plan for terminating the leases. Moreover, the court below made specific findings as to the unavailability and unsuitability of other manufacturers' machines which were offered for sale for any part of the 1939-1955 period. In these circumstances, Hanover is not barred from damages occurring before June of 1951, the date of the close of evidence in the Government case (Compare International Shoe Machinery Corp. v. United Shoe Machinery Corp., supra), nor does United so argue.

*Shoe Machinery Corp. v. United States*, 258 U.S. 451 (1922). In Judge Wyzanski's words: "What United is now doing is similar to what it was then doing, but the activities which were similar stood uncondemned,—indeed, one ought to go further and say they were in part endorsed." 110 F.Supp. at 348.[14] He held that the last two cases still had enough vitality to prevent his holding, as he otherwise would, that United had violated § 1 of the Sherman Act by its lease-only practice. "[T]his inferior court feels precluded," said Judge Wyzanski, "from so deciding because of the overhanging shadows of . . . the Sherman and Clayton Act cases involving this company's predecessor and itself. Though these cases may ultimately be overruled by the Supreme Court, they have not yet lost all authority." 110 F.Supp. at 343. Judge Wyzanski was of the view, however, that the interpretation of § 2 of the Sherman Act was significantly changed in 1946 when the Supreme Court in *American Tobacco Co. v. United States*, 328 U.S. 781, 811-15 (1946) expressly approved Judge Learned Hand's analysis in 1945 in the *Alcoa* case, *United States v. Aluminum Co. of America*, 148 F.2d 416 (2 Cir. 1945). Judge Wyzanski stressed the absence in United's conduct of predatory practices, which the decisions prior to *Alcoa* had emphasized as an element in monopolization.[15] He held that United's conduct now ran afoul, however, of § 2 under the *Alcoa* doctrine, which brought within its prohibition monopolization attained by conduct which although

14. This was so even though certain provisions of its leases, since terminated, had been held violative of § 3 of the Clayton Act in the third case, for United was specifically found free of the taint of predatory practices. 258 U.S. at 455.

15. See, e.g., United States v. United States Steel Corp., 251 U.S. 417 (1920).

"honestly industrial" cannot be said to render market control, which is inherently evil, an economically inevitable result, for in such a case it cannot be said of a defendant that greatness was thrust upon him. 110 F.Supp. at 341-42. In so finding, however, Judge Wyzanski said: "It is only fair to add that the more than 14,000 page record, and the more than 5,000 exhibits, representing the diligent seven year search made by Government counsel aided by this Court's orders giving them full access to United's files during the last 40 years, show that United's power does not rest on predatory practices. Probably few monopolies could produce a record so free from any taint of that kind of wrongdoing." 110 F.Supp. at 345.

In these circumstances, we believe it was error to hold that United was liable in damages to Hanover for the period stretching back to the beginning of its conduct, despite the approval of its leasing policy in various forms by three successive decisions of the Supreme Court. The court below cut off damages prior to July 1, 1939 only because the statute of limitations barred such recovery. On the contrary, we think it erroneous to award damages for conduct manifestly pursued in the shelter of Supreme Court approval, at least until such time as subsequent decisions have clearly announced a change in the applicable law. This conclusion follows from Judge Wyzanski's opinion and the modern view of the rights of parties who have relied upon authoritative statements of the law which are later changed.

Recent decisions of the Supreme Court in criminal cases have made it clear that the unrealistic theory that the law has always been what the latest case for the first time declares it to be, the so-called Blackstonian view, must yield

to the practical realization that conduct had occurred in reliance on the earlier rules of law to the contrary.[16] In antitrust cases the question of retroactivity is still open.[17] We believe that retroactivity should be determined from the circumstances of the particular case, having in mind the purpose which the new rule of law seeks to accomplish and the practical weighing of the comparative benefits and evils of retroactivity. In civil cases, unlike criminal cases, it is appropriate to recognize that businessmen must rely upon counsel, who in turn are guided by the existing precedents in making difficult decisions on the effect of the antitrust laws on specific business conduct. In suits for damages in such cases it is particularly appropriate to be mindful of the injustice of retroactive imposition of the penalty of treble damages. In the present case the penalty of treble damages is enough, in conjunction with the absence of predatory practices and the survival of United's leasing policy under the Sherman Act after three passages through the Supreme Court, to require that United should not be held to have violated the antitrust laws before the change occurred in the law which for the first time made its conduct unlawful.

16. Thus, e.g., retroactivity was refused to be accorded in Linkletter v. Walker, 381 U.S. 618 (1965), to Mapp v. Ohio, 367 U.S. 643 (1961), dealing with exclusion of illegally seized evidence; in Tehan v. United States ex rel. Shott, 382 U.S. 406 (1966), to Griffin v. California, 380 U.S. 609 (1965), dealing with comment on the failure of a defendant in a state criminal trial to take the stand; in Johnson v. New Jersey, 384 U.S. 719 (1966), to Escobedo v. Illinois, 378 U.S. 478 (1964) and Miranda v. Arizona, 384 U.S. 436 (1966), dealing with custodial police questioning of criminal suspects. See also Butcher v. Philadelphia, 380 Pa. 290 (1955).

17. Simpson v. Union Oil Co., 377 U.S. 13, 24-25 (1964); see also Lyons v. Westinghouse Electric Corp., 235 F.Supp. 526, 536-37 (S.D.N.Y. 1964).

The remnant of the problem which remains is whether the appropriate date which marks the commencement of liability should be the date of the *American Tobacco* decision of June 10, 1946 or the *Alcoa* decision of March 12, 1945. The high authority of Judge Hand's opinions and the unusual circumstances in which *Alcoa* came to be decided give the case a place of preeminence in the history of antitrust law. We do not believe, however, that another business which had three times in various forms been adjudged free from violation of the Sherman Act was required to abandon its well known form of operation before Judge Hand's view in *Alcoa* received the imprimatur of the Supreme Court, however inevitable it may now seem in retrospect. At the time it was well known that *Alcoa* could not be passed on by the Supreme Court,[18] and whether it would agree with

18. The decision in Alcoa by the Circuit Court of Appeals for the Second Circuit was final because of the unique circumstances which surrounded the case. The district court had dismissed the complaint, United States v. Aluminum Co. of America, 44 F.Supp. 97 (S.D.N.Y. 1941), and on a direct appeal the Supreme Court was without a quorum due to the disqualification of four Justices. The Court therefore transferred the case to a special docket and postponed further proceedings in the appeal until such time as there was a quorum of Justices qualified to sit in the case. 320 U.S. 708 (1943). Congress thereafter amended 15 U.S.C. § 29 by the Act of June 9, 1944, ch. 239, 58 Stat. 272, which provided that in such circumstances the Court should certify the case to the appropriate circuit court of appeals, in lieu of a decision by the Supreme Court, and the decision of the circuit court of appeals should be final and unreviewable. Acting under the statute the Supreme Court certified the case to the Circuit Court of Appeals for the Second Circuit and it was in what Mr. Justice Frankfurter concurring in United States v. United States District Court for the Southern District of New York, 334 U.S. 258, 265 (1948) called "an extraordinarily rare, if not unique, situation in the history of the Court," that Judge Learned Hand's decision came to be written in Alcoa. See also American Tobacco Co. v. United States, 328 U.S. 781, 811-12 (1946).

Judge Hand's opinion could only be made known in another case, as it was a year later in *American Tobacco* on June 10, 1946.

We conclude, therefore, that United's conduct cannot be held to have violated § 2 of the Sherman Act at any time prior to June 10, 1946. We believe this is the effect to be given to the Government decree. The damages recoverable by Hanover therefore may not reach any earlier period.

CERTIFICATION

United urges that the court below should have certified to the District Court in Massachusetts the questions dealing with the interpretation and effect of that court's decree. The obvious economy in judicial effort which would follow from such a practice, especially in a case as protracted as the Government suit against United, speaks strongly in its favor. On the other hand, there is much to be said for a litigant's right to the judgment of the court which he invokes and for the view that the scope of the conclusions and decrees of sister federal courts, however complicated may be the litigation out of which they arose, may well be determined by an objective evaluation of what has been recorded in opinion and decree rather than by a subjective interpretation which may include in retrospect what was locked in the breast of the original judge.

In the circumstances which prevail in this case, however, we need not determine this interesting question.[19] United did not apply for certification of the questions relat-

19. See United States Gypsum Co. v. National Gypsum Co., 352 U.S. 457 (1957); see also Levin, Inter-Jurisdictional Certification: Beyond Abstention Toward Cooperative Judicial Federalism, 111 U. Pa. L. Rev. 344 (1963).

ing to the meaning and effect of the Government decree during the lengthy trial in the court below. It did not even do so immediately after the opinion was filed in the district court on April 28, 1965. Instead, on May 21, 1965, United applied to Judge Wyzanski in the District Court in Massachusetts on notice to Hanover and the Government for construction or amendment of the Government decree. At a hearing on May 28, 1965 Judge Wyzanski declined to act on the ground of comity in view of the late stage of the case in the Middle District of Pennsylvania.

United contends with much force that Judge Wyzanski plainly indicated at the hearing his informal interpretation of the decree contrary to that of the court below. But whatever the parties may make of Judge Wyzanski's comments from the bench at that time, it was not until after the application was denied on May 28, 1965 that United, on June 9, 1965 in connection with its motion for a partial new trial applied for a certification by the court below to the District Court in Massachusetts of the questions relating to the effect of the Government decree.

We hold that in view of the untimeliness of the request for certification, its denial by the court below was not an abuse of discretion.

## Statute of Limitations

The suit was filed before the effective date of the amendment of July 7, 1955 creating a federal four year statute of limitations in antitrust actions (15 U.S.C. § 15b). The parties are agreed that by virtue of the applicable Pennsylvania statute and various tolling provisions[20] the

20. See 245 F.Supp. at 294, n. 15.

six-year period under the statute was extended backward so as to bar claims for conduct prior to July 1, 1939.

The contention now made, however, is that if there was a refusal by United to sell shoe machinery to Hanover, the injury occurred many years prior to 1939, in fact perhaps even before the present century, and hence all recovery is barred by the statute of limitations. This contention falls in view of our holding that the duty to sell established by the Government decree did not come into existence until 1946. Since the injury could not have occurred prior to 1946, Hanover's claim is well within the period of the statute of limitations.

## Damages

1. *The Damages Within the Allowable Period.*

The court below held that as a result of United's unlawful monopolization Hanover was required to pay more on the leases for the use of its shoe machinery than it would have been required to pay if the machinery had been available for sale in a free and competitive market. It held that as a result Hanover was damaged in the period from July 1, 1939 through September 21, 1955 in the amount of $1,413,203, which when trebled amounted to $4,239,609.

The damage period, as we have already seen, must be limited to commence on June 10, 1946. In the present state of the record it is not clear that the court below was justified in fixing the end of the damage period at the date of the institution of the action. Section 9 of the Government decree required United to present to the court before "B Day" a detailed plan for terminating all outstanding leases and for converting the lessees' rights to ownership

of the machines they then held. The plan was approved by Judge Wyzanski on June 1, 1955. The record shows that Hanover actually converted to ownership its previously leased machines sometimes in October, 1955.

In these circumstances, the damage period ended on June 1, 1955 for on that date the conversion from leasehold to ownership was available to Hanover and the unlawful lease-only policy had ended.

Accordingly, no damages may be allowed for the period between June 1, and September 21, 1955,[21] or, as we have already determined, for the period prior to June 10, 1946. Since there is no division in the record of the damages for either of these two periods, it will be necessary to award a new trial on the issue of damages so that the proof may be broken down to show what damages, if any, were sustained during the allowable period.

A number of problems in the proof of damages which have been presented to us will recur on retrial. To the extent that it is possible to adjudicate them on the present record, it is desirable that we do so as a guide to the court below on the retrial.

2. *Cost of Capital.*

United contends that Hanover's so-called cost of capital should have been treated as an element of the cost of acquiring the machinery. The court below disallowed this item, which was defined as "the rate of return expected by investors on capital funds they place at . . . [a concern's] disposal," after hearing the conflicting testimony of expert economists called by each party. It found that "cost of

21. Of course, the credit for salvage value should be computed as of that date.

capital" is an economic concept which allows a company to decide if a certain investment is sound by computing the rate of return which will be required on that investment to justify expending funds on it rather than in an alternative investment, and that it is measured in terms of percentage of earnings per share of common stock to price per share, and of percentage of net profits after taxes to stockholders' equity. It also found that the measurement of cost of capital was vague and not susceptible of general agreement in its application and that in any event it was not a proper element in the calculation of damages but was only a guide to investment.

The novel concept which United sought to have approved has not yet reached the point of general acceptance even among economists. We agree with the court below that cost of capital is not sufficiently related to actual costs to be included in an antitrust damage calculation.

3. *Tax Benefits.*

The court below held that whatever tax advantages Hanover obtained by the leasing system could not be considered in reduction of the amount of Hanover's recovery. It did so on the grounds that generally in tort and breach of contract actions taxes are not considered in assessing damages[22] and that any recovery by Hanover would be subject to taxation. It relied upon Judge Goodrich's statement in the passing-on trial that whatever happens after the injury which permits an injured plaintiff to escape some of the consequences of the wrong done him does not inure to the benefit of the defendant.[23] It therefore held

22. Citing annotations in 63 ALR 2d 1393 and 1433.

23. 185 F.Supp. at 829.

that tax consequences to Hanover such as deductions for rents and royalties of lease machines and capital gains treatment for machines if owned and later sold were extraneous and were not to be considered.

In this we think the court below erred. What is involved here is not the tax on Hanover's recovery but rather the tax elements which would bear on Hanover's choice of purchasing rather than leasing the machinery it required. In making such a determination a business of any size necessarily must give consideration to the tax elements inherent in the two alternatives from which the choice must be made. It therefore was significant in determining whether Hanover, if it had been able to do so, would have purchased the machinery which it leased from United, to evaluate the respective tax consequences of purchase and of lease and their financial impact. Since these tax consequences are so inherently a part of the choice which would be made and since the court below has found that Hanover would have chosen to buy rather than lease the machinery, the award of damages should not exceed the difference between the two alternatives as Hanover itself would have computed it. The excess of one over the other of the two alternatives of purchase or lease should not be artificially inflated by ignoring the impact of taxation. We deal here not with subsequent tax effect on damages inflicted, but rather with damages resulting from the choice of one over another course of action in both of which the tax impact necessarily was a matter of contemporaneous consideration and significance. This is as realistic an element as the deduction which the court below required in order to reflect the fact that United serviced its machines as lessor, a duty which Hanover itself would have had to assume and pay

for if it had been the owner of the machines.[24] In the same way, if Hanover had owned rather than leased the machines it would not have had the benefit of tax deductions for the rental and royalty payments to United and would have been subject to capital gains tax on the sale of any machines it sold at more than depreciated book value. It would be a distortion of reality to permit Hanover to recover damages on the ground that it would have bought machinery if it had been allowed to do so, without requiring it to give credit in its calculation of its damages for the savings which accrued to it from the tax advantages it received under the leasing system it now disowns and without also requiring it to reflect in its costs of ownership the taxes which such dominion would have imposed.

Hanover's damages therefore must be diminished by permitting United to show the favorable tax consequences which Hanover obtained from leasing and the unfavorable consequences which would have flowed from ownership of the machinery. We do no more than require accuracy in the calculation of the relative financial cost of leasing compared to buying the machinery, which must include those elements which a business corporation would necessarily consider in choosing between the two alternatives.

## Hanover's Cross-Appeal

Hanover in its cross-appeal attacks the district court's exclusion from its recoverable damages of those damages attributable to the unavailability of the United Goodyear Outsole Rapid Lockstitch Machine ("ORL") for the period 1939-1955, which it claimed amounted to $324,356.[25]

24. See 245 F.Supp. at 287.

25. See 245 F.Supp. at 299, 302.

The court below excluded the item on the ground that another manufacturer's equipment, known as the Landis Stitcher, was available to Hanover and would have been satisfactory for its operations.[26] Hanover maintains that there is no evidence to support the conclusion that the Landis Stitcher was a satisfactory substitute for the ORL. It therefore seeks to have its damage judgment increased by threefold the amount of $324,356.

Even if Hanover's contention is correct, the present record does not permit an award of damages for this item. For the amount of $324,356 stretches over the period from 1939 to 1955 and we cannot allocate it within the allowable period beginning June 10, 1946 and ending June 1, 1955. This issue therefore must be remitted to the court below for reconsideration as part of the retrial on damages. When evidence has been taken on this question on retrial the record may well be different from what is now before us. In these circumstances, therefore, we shall not pass on the sufficiency of the present record to justify the conclusion that the Landis Stitcher could be used satisfactorily in Hanover's welt shoe manufacturing as a substitute for the ORL machine.

26. 245 F.Supp. at 283.

## Counsel Fees

The court below allowed to Hanover an attorneys' fee of $600,000 for the services of New York counsel and $50,000 for the services of Pennsylvania counsel. United objects that the allowances are excessive.

The district court tested the reasonableness of the fees, especially to New York counsel, not only by the hours devoted to the case, but also by the percentage of the recovery in its original and trebled amounts. See 245 F.Supp. at 303-4. Since the period for which damages may be awarded is now being reduced and a retrial will be held on damages, it will be for the court below to determine the reasonable fees which should be made to counsel in the light of whatever new award it may make on damages.

We will therefore vacate the award of counsel fees and order counsel fees to be redetermined in the light of whatever damages the court may find on the rehearing.

## Conclusion

In United's appeal (Appeal No. 15626) the judgment of the court below will be vacated as to damages and a new trial will be awarded limited to damages, in accordance with this opinion; and the award of counsel fees in the amount of $600,000 for the services of Donovan Leisure Newton & Irvine and $50,000 for the services of Nogi, O'Malley & Harris will be vacated for further proceedings in accordance with this opinion.

In Hanover's appeal (Appeal No. 15627) the judgment will be vacated so that the issue therein raised may be reconsidered as part of the retrial of damages.

A True Copy:

Teste:

*Clerk of the United States Court of Appeals for the Third Circuit.*

## Supplemental Opinion of the Court

(Filed May 18, 1967)

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

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No. 15626

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THE HANOVER SHOE, INC.,

*v.*

UNITED SHOE MACHINERY CORPORATION,

*Appellant.*

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No. 15627

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THE HANOVER SHOE, INC.,

*Appellant,*

*v.*

UNITED SHOE MACHINERY CORPORATION.

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Before: FORMAN, GANEY and FREEDMAN, *Circuit Judges*

FREEDMAN, *Circuit Judge:*

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Only one argument made in the petitions for rehearing calls for further comment. United argues in its petition, as it did before us, that the statute of limitations completely bars Hanover's claim for damages. Both parties had conceded at trial that the applicable six-year Pennsylvania statute of limitations had been extended backward by various tolling provisions to allow recovery of all damages incurred after 1939. We reduced the period of allowable

damages to one beginning in 1946, when the *American Tobacco* case was decided, and we did not reach United's contention regarding the statute of limitations, because we reasoned that since United's conduct did not become illegal until 1946, Hanover's cause of action for damages could not have arisen any earlier.

United now argues that the statute of limitations began to run in 1912 or even earlier, when it first refused to sell its machinery, and that the statute was not tolled simply because the conduct which caused the injury was legal under the precedents of that time.[1] This, however, does not require a different result in this case, for United has misconceived the basic nature of Hanover's claim for damages.

United argues that where a refusal to deal causing damages has occurred well before the allowable period under the statute of limitations, no recovery may be had, even for damages following the reiteration of such a refusal to deal within the statutory period.[2] The cases relied on,

1. For this United cites Marreo Morales v. Bull Steamship Co., 279 F.2d 299 (1 Cir. 1960); Versluis v. Town of Haskell, 154 F.2d 935 (10 Cir. 1946).

2. For this United cites Garelick v. Goerlich's, Inc., 323 F.2d 854 (6 Cir. 1963); Peto v. Madison Square Garden Corp., 1965 Trade Cases ¶ 71,398 (S.D.N.Y. 1965); Sherman v. Goerlich's Inc., 238 F.Supp. 728 (E.D.Mich. 1963), aff'd, 341 F.2d 988 (6 Cir. 1965), cert. denied, 382 U.S. 830 (1965); Norman Tobacco & Candy Co., Inc. v. Gillette Safety Razor Co., 197 F.Supp. 333 (N.D.Ala. 1960), aff'd, 295 F.2d 362 (5 Cir. 1961); Emich Motors Corp. v. General Motors Corp., 1955 Trade Cases ¶ 67,960 (N.D.Ill. 1955), aff'd, 229 F.2d 714 (7 Cir. 1956). See also Steiner v. 20th Century-Fox Film Corp., 232 F.2d 190 (9 Cir. 1956); The Campbell Distributing Co. v. Jos. Schlitz Brewing Co., 208 F.Supp. 523 (D.Md. 1962); Gaetzi v. Carling Brewing Co., 205 F.Supp. 615 (E.D.Mich. 1962); Farbenfabriken Bayer, A.G. v. Sterling Drug, Inc., 153 F.Supp. 589 (D.N.J. 1957), aff'd, 307 F.2d 210 (3 Cir. 1962), cert. denied, 372 U.S. 929 (1963).

however, are very different from the present case. First, they are antitrust conspiracy cases in which the plaintiff sought to recover damages for the full period both within and outside the statute of limitations, on the claim that the statute did not begin to run until the termination of the conspiracy. Here, however, Hanover does not seek to recover the damages it suffered before 1939; it concedes that any claims it had for conduct in that period are now barred and seeks only to recover for damages inflicted after 1939. Secondly, on the facts in the cases cited by United it would have been difficult to segregate damages which flowed from the original refusal to deal from damages attributable to the continued refusals within the statutory period. On the other hand, the specific collection of rentals every month within the statutory period provides a concrete standard for the measurement of the damages which occurred here within the statutory period by comparing the rentals with the reasonable sales value of the machinery.[3] Finally, in the cited cases the continuing conduct was that of a mere re-assertion of the refusal to deal. Here, however, United went beyond a mere continuation of the refusal to sell; it collected rentals on leases and entered into new leases when old machinery was no longer in working condition and required replacement.

The rule applicable to the facts in this case is that where the repeated and measurable invasion of a plaintiff's rights occurs both outside the statutory period and also within it, the fact that some of the injury and damage occurred outside the statutory period does not affect the

3. The Muskin Shoe Co. v. United Shoe Machinery Corp., 167 F.Supp. 106 (D.Md. 1958), which found a similar measure too complex, was specifically rejected by Chief Judge Sheridan, and we agree that it should not be followed. See 245 F.Supp. at 295-96.

plaintiff's right to recover for the separate invasion of its rights which occurred within the period.[4] Indeed, any other rule would be an affront to reason, for it would require the conclusion that injury and damages which were inflicted, as in this case, in 1955, by concrete and specific business transactions, were barred by the statute of limitations as long ago as 1918 or even earlier, because of similar but not identical conduct. The policy of the statute of limitations is maintained by allowing recovery for measurable injury within the period and barring recovery for injury beyond it. The operative facts underlying Hanover's claim occurred within the statutory period as tolled, and the traditional concern regarding lost witnesses and fading memories is thus fully satisfied. Moreover, we effectuate the general policy against stale claims in barring injury suffered before 1946. In so doing, however, we see no need to wipe out Hanover's current claim.[5]

A True Copy:

Teste:

*Clerk of the United States Court of Appeals for the Third Circuit.*

---

4. Highland Supply Corp. v. Reynolds Metals Co., 327 F.2d 725 (8 Cir. 1964); Roosevelt Raceway, Inc. v. Universal Controls, Inc., 1965 Trade Cases ¶ 71,565 (E.D.N.Y. 1965); Susser v. Carvel Corp., 206 F.Supp. 636 (S.D.N.Y. 1962), aff'd 332 F.2d 505 (2 Cir. 1964), cert. dismissed, 381 U.S. 125 (1965); Cardinal Films, Inc. v. Republic Pictures Corp., 148 F.Supp. 156 (S.D.N.Y. 1957).

5. See Daniels v. The Beryllium Corp., 227 F.Supp. 591 (E.D.Pa. 1964) and 211 F. Supp. 452 (E.D.Pa. 1962), where recovery was permitted for the aggravation of an illness during the statutory period, although relief for the original injury was held barred by the statute of limitations.

## Order Amending Judgment and Amended Judgment

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

---

No. 15626

---

THE HANOVER SHOE, INC.

*v.*

UNITED SHOE MACHINERY CORPORATION,

*Appellant*

---

No. 15627

---

THE HANOVER SHOE, INC.

*Appellant,*

*v.*

UNITED SHOE MACHINERY CORPORATION,

---

Present: Forman, Ganey and Freedman, *Circuit Judges*

ORDER AMENDING JUDGMENT

The judgment in these appeals is hereby amended by striking out the award of costs to each appellant and by providing in lieu thereof that in each appeal the amount of attorneys fees in the prosecution, briefing and arguing of

the appeal shall be determined by the district court as part of the retrial of the issue of damages, and that the costs on this appeal shall abide the ultimate decision in this action.

By the Court,

ABRAHAM L. FREEDMAN

.....

Circuit Judge

Date: June 7, 1967

*Order Amending Judgment and Amended Judgment*

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 15626

THE HANOVER SHOE, INC.

*v.*

UNITED SHOE MACHINERY CORPORATION,

*Appellant*

No. 15627

THE HANOVER SHOE, INC.

*Appellant,*

*v.*

UNITED SHOE MACHINERY CORPORATION

(D. C. Civil No. 5395)

APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

Present—FOREMAN, GANEY and FREEDMAN, *Circuit Judges.*

AMENDED JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Middle District of Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that in United's appeal (No. 15,626) the judgment of the District Court, filed August 13, 1965,

be, and the same is hereby vacated as to damages and a new trial is awarded limited to damages, in accordance with the opinion of this Court; and the award of counsel fees in the amount of $600,000 for the services of Donovan Leisure Newton & Irvine and $50,000 for the services of Nogi, O'Malley & Harris be and hereby is vacated for further proceedings in accordance with the opinion of this Court; in Hanover's appeal (No. 15,627) the judgment of the District Court, filed August 13, 1965, be, and the same is hereby vacated so that the issue therein raised may be reconsidered as part of the retrial of damages. The amount of attorneys fees in the prosecution, briefing and argument of each of these appeals shall be determined by the District Court as part of the retrial of the issue of damages, and the costs on these appeals shall abide the ultimate decision in this action.

ATTEST:

THOMAS F. QUINN
Clerk

June 7, 1967

## APPENDIX B

## Order Denying Rehearing

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

---

No. 15626

THE HANOVER SHOE, INC.

*v.*

UNITED SHOE MACHINERY CORPORATION,

*Appellant*

---

No. 15627

---

THE HANOVER SHOE, INC.

*Appellant,*

*v.*

UNITED SHOE MACHINERY CORPORATION

### SUR PETITION FOR REHEARING

Present—Staley, Chief Judge, McLaughlin, Kalodner, Hastie, Forman, Ganey, Smith, Freedman and Seitz, Circuit Judges.

The petitions for rehearing filed by The Hanover Shoe, Inc. and United Shoe Machinery Corporation in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision

having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petitions for rehearing are denied.

By the Court,
ABRAHAM L. FREEDMAN

.....
Judge

Dated: May 18, 1967

## Order

SUPREME COURT OF THE UNITED STATES

No. 335, October Term, 1967

THE HANOVER SHOE, INC.,
*Petitioner,*

*v.*

UNITED SHOE MACHINERY CORPORATION

ORDER ALLOWING CERTIORARI. Filed October 9, 1967

The petition herein for a writ of certiorari to the United States Court of Appeals for the Third Circuit is granted. The case is consolidated with No. 463 and two hours are allotted for oral argument.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Marshall took no part in the consideration or decision of this petition.

## Order

SUPREME COURT OF THE UNITED STATES

No. 463, October Term, 1967

UNITED SHOE MACHINERY CORPORATION,
*Petitioner,*

*v.*

THE HANOVER SHOE, INC.

ORDER ALLOWING CERTIORARI. Filed October 9, 1967

The petition herein for a writ of certiorari to the United States Court of Appeals for the Third Circuit is granted. The case is consolidated with No. 335 and two hours are allotted for oral argument.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Marshall took no part in the consideration or decision of this petition.

# Complaint

IN THE

## DISTRICT COURT OF THE UNIED STATES

FOR THE DISTRICT OF MASSACHUSETTS

Civil No. 7198

UNITED STATES OF AMERICA, PLAINTIFF

*v.*

UNITED SHOE MACHINERY CORPORATION, DEFENDANT

The United States of America by its attorneys, acting under the direction of the Attorney General of the United States, brings this action against the United Shoe Machinery Corporation and complains and alleges, on information and belief, as follows:

* * * * *

## OFFENSES CHARGED

* * * * *

C. THE PURSUIT BY UNITED OF A MANUFACTURING AND MARKETING POLICY DESIGNED TO RESTRICT AND ELIMINATE COMPETITION.

* * * * *

*1. United's leasing policy*

61. For many years United has declined to sell most of its shoe machines and has made such machines available to shoe manufacturers only upon leases which reserve to United the sole and exclusive property in the machines and which grant to lessees the right to use the machines only for the purposes specified in the leases. United

offers certain of its machines upon lease or sale terms at the option of shoe manufacturers but has followed the practice of establishing such alternative terms of sale and lease as will cause shoe manufacturers to lease such machines. As a consequence, most machines offered by United on optional terms are leased by shoe manufacturers.

62. At present United offers on lease only all of its major machines, except sole cutting and certain leveling machines; all minor machines handled, with a few unimportant exceptions, by its Lasting-Heeling, Goodyear, Littleway, and Cement Shoe departments; and various minor machines handled by its other departments. It offers on sale and not on lease a limited number of unimportant shoe machines handled, principally, by its General Department. All other shoe machines are offered on optional lease or sale terms. As a consequence of the foregoing, of the 123,000 United machines in shoe factories today only 21,000, or approximately 18%, are owned by shoe manufacturers.

* * * * *

## Prayer

Wherefore, the plaintiff prays:

* * * * *

7. That the defendant be required to offer to sell at reasonable prices all shoe machinery manufactured and commercialized by it and be enjoined from leasing shoe machinery except upon terms and conditions approved by the Court.

* * * * *

15. That the plaintiff have such other further and general relief as may be just and proper.

16. That the plaintiff recover the costs of this suit.

GRANT W. KELLEHER,
*Special Assistant to the Attorney General.*

C. WORTH ROWLEY,
ALFRED KARSTED,
EDWARD M. FEENEY,
ROY N. FREED,
*Special Attorneys.*

TOM C. CLARK,
*Attorney General.*

JOHN F. SONNETT,
*Assistant Attorney General.*

HOLMES BALDRIDGE,
*Special Assistant to the Attorney General.*

WILLIAM T. MCCARTHY,
*United States Attorney.*

## Final Decree

## UNITED STATES DISTRICT COURT

DISTRICT OF MASSACHUSETTS

UNITED STATES OF AMERICA,

v.

UNITED SHOE MACHINERY CORPORATION.
CIVIL ACTION No. 7198

FINAL DECREE, February 18, 1953, as modified by orders of the Court, July 12, 1954 and September 17, 1954.

This cause having come on to be heard, and the Court having fully considered the evidence and arguments, and having filed its Findings of Fact, and Opinions on Violation and Remedy, it is hereby

ORDERED, ADJUDGED, AND DECREED that:

1. As used in this Decree:

"A Day" means January 1, 1955.

"B Day" means April 1, 1955.

"C Day" means January 1, 1965.

"Shoe Machinery" means all types of shoe machinery distributed to shoe factories for use in the manufacture or repair of footwear, except dry thread sewing machines.

The words "machine type," "machines" and "machine" as used in this Decree mean "shoe machinery" as defined herein.

The word "supplies" as used in this Decree means all products, when distributed by defendant for use or consumption by shoe factories, of the types heretofore classified by the defendant as sales merchandise.

The word "patent" as used in this Decree means a United States patent for an invention relating to the manufacture, use or sale of footwear, shoe machinery or supplies.

2. Defendant violated § 2 of the Sherman Act, 15 U.S.C. § 2, by monopolizing the shoe machinery trade and commerce among the several States. Defendant violated the same section of the law by monopolizing that part of the interstate trade and commerce in tacks, nails and eyelets, which is concerned with supplying the demand for those products by shoe factories within the United States. The other charges of violation of the Sherman Act set forth in the complaint are dismissed with prejudice. No obligation of the Defendant under this Decree shall apply to its manufacturing, distribution, service, patent or other activities in any industry other than shoe machinery and supplies or in relation to any industry other than the shoe manufacturing industry.

3. Defendant, its subsidiaries, and each of their directors, officers, agents, and employees, and all persons acting for them, are hereby enjoined and restrained from further monopolizing those parts of the trade or commerce among the several States which have been referred to in the previous paragraph.

4. All leases made by defendant which include either a ten-year term, or a full capacity clause, or deferred payment charges, and all leases under which during the life of the leases defendant has rendered repair and other service without making them subject to separate, segregated charges, are declared to have been means whereby defendant monopolized the shoe machinery market.

5. After A Day, defendant shall not offer for lease any machine type, unless it also offers such type for sale. Defendant, if it offers any machine type for lease, shall set such terms for leasing that machine as do not make it substantially more advantageous for a shoe factory to lease rather than to buy a machine. Defendant shall not be required to secure advance judicial approval of the financial terms in sales or lease contracts. But if any lease or contract substantially discriminates in favor of leasing, plaintiff may apply to this Court for further specific relief.

6. Before A Day, defendant, if it desires to continue to lease any shoe machinery, shall file in this Court a standard form of lease that meets the following directions. Other standard forms of lease shall be filed in this Court by defendant promptly as they are printed and before defendant places them in use.

a. The maximum term for either an original or renewal lease shall be five years.

b. Provision shall be made that a lessee shall have the right to return the leased machine at any time after one year, on paying all rentals already accrued, the shipping charges, the cost of broken

and missing parts, and in addition, no more than the equivalent of the monthly (not the unit) payments which would have been due had the lessee kept the machine for an additional three months. The lease may provide for return on terms more favorable to the lessee if the return is due exclusively to defects in the machine, or customer dissatisfaction after a trial period, or customer abandonment of operations. But no return charge shall discriminate on account of the substitution of a competitive machine.

c. The new forms of lease shall not include any return of deferred payment charges other than those specified in the previous paragraph. But they may include provisions for initial charges and deposits.

d. Defendant may, if it sees fit, use a unit charge in addition to, or as an alternative to, monthly rental charges. But such unit charges shall have no minimum.

e. After A Day, defendant shall not include within any lease, whether unit charges are used or not, a full capacity clause, or any equivalent.

f. After A Day, defendant shall not include either in the terms of, or the application of, any lease any plan similar to the right of deduction fund which it has heretofore established, or the 1935 Plan which it adopted for lessees desiring to return machinery.

g. Defendant shall not be obliged to present to the Court a statement of what will be the amount of, or method of calculating, its rentals, its charges, deposits, or like financial terms. But, after A Day,

in preparing, executing, or applying its leases, defendant shall not discriminate between customers of the same general class, except that defendant may make different deposit provisions for different persons, upon an individual basis.

h. Defendant may propose various uniform lease riders to provide for peak-load or trial installations. Defendant may also use various loan forms to cover installation of experimental or other machines for which commercial terms have not been adopted. All such riders and forms shall comply with the preceding paragraphs.

i. Each lease shall expressly state what services and privileges it covers. After A Day, defendant may render, without separate charges, instruction services, installation services, repair services, or other services, during a period of 30 days, exclusive of Saturdays, Sundays and holidays, after the machine has been first installed and set up in line for use in shoe manufacture. After such 30-day period, defendant shall not provide any such services for a machine covered by a lease, except during the first 60 days, exclusive of Saturdays, Sundays and holidays, of a trial installation period covered by a lease trial rider as above provided, other than upon the basis of separate and reasonable charges for the services rendered, and the permission to render service for machines covered by lease trial riders herein contained shall be subject to the condition that similar service is made available for trial installations of machines whether to be leased or to be sold.

j. Defendant shall not vary the substance of the forms of lease submitted to the Court, without the Court's approval, but defendant may, without submitting them to the Court, use such special forms of lease or loan agreements as may be appropriate to the requirements of Federal, State or local governmental agencies and of educational institutions not engaged in the manufacture of footwear for profit. This provision shall not be interpreted as requiring defendant to secure advance judicial approval of the dollars and cents figures used in setting monthly rental charges, unit charges, deposits, or other specifically fiscal aspects of the lease.

7. Except for good cause, defendant shall not after A Day refuse a prospective customer's request to lease or buy a machine, of a type which defendant is at the time of such request offering for commercial lease or sale. In the event that a prospective customer is refused the privilege of buying or leasing a machine, he shall have the right to intervene in this case in this Court to have his controversy adjudicated, and in such proceedings, defendant shall have the burden of proving that there is good cause for refusing to make the sale or lease.

8. Before A Day, defendant shall present to the Court, if it desires to continue to render repair and other services, a tariff of the charges which it proposes to apply for rendering service. This service tariff shall have uniform charges for leased and sold machines. It may take into account travel time as well as time used in making repairs or rendering other services. It may recognize any economy defendant actually realizes in its business on a

quantity basis, or any other economies in servicing customers of a particular type, or customers who commit themselves for particular periods of time, in any event, however, not exceeding twelve months at a time. Neither the tariff nor this Decree shall be interpreted as requiring defendant to render services in connection with machines, or parts, not of its manufacture. The tariff shall provide that parts shall be made available on the same terms to customers receiving services, customers not receiving services, and any other person; provided, however, that defendant shall not be obliged to furnish parts to a customer to help him construct an entire new machine out of assembled parts.

9. Before B Day, defendant, after conferring with plaintiff, with representatives of The National Shoe Manufacturers Association, and with any lessees who previous to B Day have intervened in these proceedings, shall present to the Court a detailed plan for terminating all outstanding leases. This plan shall make appropriate non-discriminatory financial provisions for defendant's rights and each lessee's rights in connection with the termination of existing leases. It shall also make non-discriminatory provisions under which, within a reasonable period of time, lessees under leases existing before B Day may buy or lease those machines which have been installed. Such provisions shall be at least as favorable to shoe factories as the provisions in the new lease and sale forms.

10. Before B Day, defendant shall submit a plan for disposing of such parts of its business and the business of its subsidiaries as are concerned with the manufacture or distribution of tacks, nails and eyelets.

11. Beginning three years after A Day, defendant shall not distribute any supplies not manufactured by itself or a corporation in which it owns at least 20% of the Common Stock, provided that this shall not apply to supplies acquired by United before then.

12. Defendant shall grant to any applicant, except a deliberate infringer, a non-exclusive license under any or all patents now held by defendant on reasonable non-discriminatory royalty terms. Such licenses may, however, be limited to the manufacture, use, and sale of shoe machinery, shoe supplies, and like products used in shoe factories. Such licenses may contain a provision for the inspection of the records of the licensee by an independent auditor who shall report to the licensor only the amount of royalty due and payable and no other information. Such licenses shall contain a provision for imparting in writing, at a reasonable charge by the licensor to the licensee, the methods and processes used by defendant as of the date of this Decree in its commercial practices under the patents licensed. This Court reserves jurisdiction to pass upon the reasonableness of any royalty or charge herein directed to be reasonable. Nothing in this paragraph applies to patents issued upon the basis of applications filed later than A Day, nor shall anything herein prohibit the defendant from making a bona fide sale or assignment from time to time of any patent held by it.

13. After A Day, defendant shall not acquire any patent or patent application except patents or patent applications acquired by reason of bona fide employment of the inventor by it or by a subsidiary unless defendant files

in this Court an agreement to license that patent or patent application as provided in the previous paragraph with respect to patents it now owns.

14. After A Day, defendant shall not acquire any exclusive license under any patent unless such exclusive license grants defendant the right to license others and defendant promptly files in this Court an agreement to license as provided in Paragraph 12 of this Decree.

15. After A Day, defendant shall not acquire any shoe machinery business, any business manufacturing or distributing supplies for shoe factories, or any part thereof, or any stock therein, if the transaction involves more than $10,000 or its equivalent.

16. After A Day, defendant shall not buy or acquire any second-hand shoe machinery manufactured by it or any other person except for experimental or like purposes. The total acquisitions under this paragraph in any one year shall not represent an expenditure of more than $25,000, or its equivalent. Nothing in this paragraph shall be construed to apply to such rights as defendant may have to repossess, or to acquire at public auction, machines which it has conditionally sold and which the purchaser has lost the right to retain.

17. After A Day, defendant shall not continue any plan for quantity discounts in connection with any of its supplies, unless such discount system complies with all applicable laws.

18. On C Day, both parties shall report to this Court the effect of this decree, and may then petition for its modification, in view of its effect in establishing workable

competition. If either party takes advantage of this paragraph by filing a petition, each such petition shall be accompanied by affidavits setting forth the then structure of the shoe machinery market and defendant's power within that market.

19. Defendant shall pay the costs of this case.

20. On or before October 1, 1954, defendant shall send to each of its then lessees a written copy of this Decree as modified prior to the date of mailing.

21. Nothing in this Decree shall impose any obligation on defendant until three months before A Day.

22. Nothing in this Decree shall impose any obligation on defendant or its subsidiaries to do or omit any action outside the United States.

23. Jurisdiction of this cause is retained for the purpose of enabling either of the parties to apply to this Court at any time for such further orders and directions as may be appropriate for the correction, construction, or carrying out of this Decree, and to set aside the Decree and take further proceedings if future developments justify that course in the appropriate enforcement of the Anti-Trust Act.

## Stipulation of Facts

(Court Reporter's Note: As directed by the Court at page 50 and 51 of this Transcript, the following contains the paragraphs of the stipulation dated March 22, 1957 offered by plaintiff and defendant. The paragraphs are here copied in full though only part may have been offered, and where only part was offered, such part is indicated with appropriate reference to the Transcript page where the offer was made)

1. About 90% of the shoes manufactured by plaintiff have at all relevant times been distributed through and sold to the public by the Hanover Shoe Stores, owned and operated by Sheppard & Myers, Incorporated which is the wholly-owned subsidiary of plaintiff. The remainder of plaintiff's production has been sold at wholesale to J. C. Penney Co. Inc. (in 1953-55) or on a competitive bidding basis to the Armed Forces of the United States (in 1940-45 and 1951-55).

(Court Reporter's Note: The above paragraph was offered in full at page 49 of this Transcript by the plaintiff)

*Stipulation of Facts*

Presently, the officers and directors of plaintiff and its wholly owned subsidiary, Sheppard & Myers, Incorporated, include

| | The Hanover Shoe, Inc. | Sheppard & Myers, Incorporated |
|---|---|---|
| Chairman | Robert M. Laird | Lawrence B. Sheppard |
| President | Lawrence B. Sheppard | Archie C. Mudge |
| Vice President | Archie C. Mudge | Robert M. Laird |
| Treasurer | Robert M. Laird | |

• • • • •

7. On a combined basis plaintiff and its predecessors have realized an operating profit in each of their first 55 years of operation (1900-1955) except for 1932 and 1933 (Def. Ex. 1 for Id.). On a combined basis plaintiff and Sheppard & Myers, Incorporated have made profits since 1935 as follows: (inter-company dividends eliminated)

**Combined Net Profit before Income Taxes and Combined Net Profit After Income Taxes**

| Year | Net Profit Before Income Taxes | Net Profit After Income Taxes |
|---|---|---|
| 1935 | $ 393,504 | $ 323,662 |
| 1936 | 583,647 | 462,125 |
| 1937 | 565,236 | 457,843 |
| 1938 | 268,515 | 206,601 |
| 1939 | 445,418 | 352,748 |
| 1940 | 465,505 | 335,820 |
| 1941 | 958,403 | 505,680 |
| 1942 | 1,489,599 | 495,974 |
| 1943 | 1,371,583 | 442,474 |
| 1944 | 1,277,524 | 403,217 |
| 1945 | 1,538,976 | 448,481 |
| 1946 | 1,644,024 | 983,638 |
| 1947 | 3,059,373 | 1,827,389 |
| 1948 | 3,035,053 | 1,819,698 |
| 1949 | 2,554,343 | 1,528,501 |
| 1950 | 3,161,581 | 1,701,160 |
| 1951 | 2,402,591 | 1,147,690 |
| 1952 | 2,511,940 | 1,168,424 |
| 1953 | 2,507,302 | 1,200,901 |
| 1954 | 2,455,607 | 1,117,001 |
| 1955 | 2,963,232 | 1,386,854 |

(Court Reporter's Note: Defendant offered this paragraph in full at page 150 of the Transcript)

* * * * *

10. The procedure employed by plaintiff at all relevant times in determining the inventory value of shoes manufactured by it has been as follows:

In plaintiff's inventories of finished shoes and shoes in process, taken usually twice a year (July 1 and November 30 or December 31) the value placed on all materials used in making shoes is calculated at cost or market price, whichever is lower, at the inventory date; total wages paid during the period are calculated; the total overhead is also calculated, and included among some 20 items of Manufacturing Expenses, are the amounts for all charges paid by plaintiff during the period for the lease, use, maintenance and transportation of shoe machinery; and the amounts so arrived at are applied to the various styles of shoes produced, both to finished shoes and to shoes in process. The total inventory values per pair by style, determined in accordance with the foregoing steps at the end of each inventory period, have at all relevant times been less than the price per pair at which shoes are billed by plaintiff to its wholly-owned subsidiary, Sheppard & Myers, Incorporated, and less than the retail price of such shoes when offered for sale and sold by Sheppard & Myers, Incorporated; and the total of retail prices received by Sheppard & Myers, Incorporated, and the total of billing prices received by plaintiff from Sheppard & Myers, Incorporated, have each in each calendar year exceeded the final inventory value figures determined as above described. The price of shoes manufactured by plaintiff and sold by it to J. C. Penney Co., Inc. and to the United States Armed Forces have at all times been in excess of the inventory value figure determined for such shoes by plaintiff in substantially the same manner as above described. The foregoing with the records described in paragraphs 12 and 13 and with other subsidiary records

are the only records maintained by plaintiff reflecting its costs of manufacturing shoes.

(Court Reporter's Note: This paragraph was offered in full by the defendant at page 150 of the Transcript)

* * * * *

16. The royalty and rental cost per pair of shoes manufactured and sold by plaintiff for the use of all shoe machines leased by it from defendant since 1935 has been as follows:

| Year | Cost of Royalties & Rentals Paid to U. S. M. C. Only | Pairs Shoes Mfd. by T. H. S. Inc. | Royalty & Rental Cost Per Pair | Increase or Decrease |
|---|---|---|---|---|
| 1935 | $ 72,150.39(1) | 791,213 | $.0912(1) | |
| 1936 | 88,136.27(1) | 983,444 | .0896(1) | $−.0016 |
| 1937 | 87,504.15 | 1,022,135 | .0856 | −.0040 |
| 1938 | 77,314.20 | 878,777 | .0880 | +.0024 |
| 1939 | 85,636.50 | 1,006,768 | .0851 | −.0029 |
| 1940 | 90,585.47 | 1,076,265 | .0842 | −.0009 |
| 1941 | 136,839.30 | 1,674,174 | .0817 | −.0025 |
| 1942 | 156,777.28 | 1,929,277 | .0813 | −.0004 |
| 1943 | 153,604.77 | 1,915,143 | .0802 | −.0011 |
| 1944 | 149,309.85 | 1,938,289 | .0770 | −.0032 |
| 1945 | 145,206.32 | 1,870,290 | .0776 | +.0006 |
| 1946 | 142,438.50 | 1,800,172 | .0791 | +.0015 |
| 1947 | 149,692.42 | 1,831,546 | .0817 | +.0026 |
| 1948 | 155,398.87 | 1,745,269 | .0890 | +.0073 |
| 1949 | 171,894.90 | 1,780,823 | .0965 | +.0075 |
| 1950 | 184,853.23 | 1,790,277 | .1033 | +.0068 |
| 1951 | 215,768.37 | 1,918,842 | .1124 | +.0091 |
| 1952 | 198,893.75 | 1,665,508 | .1194 | +.0070 |
| 1953 | 188,383.95 | 1,547,197 | .1218 | +.0024 |
| 1954 | 174,369.46 | 1,418,136 | .1230 | +.0012 |
| 1955 | 121,638.49 | 1,515,248 | .0803 | −.0427 |

Note (1) The Royalties and Rentals paid represents all payments made by The Hanover Shoe, Inc. to U. S. M. C. and to others for the leasing of machinery. No invoices are available in the files of The Hanover Shoe, Inc. prior to 1937 to determine the breakdown showing the amount paid to U. S. M. C. only. From 1937 thru 1955 payments shown were made to U. S. M. C. only.

The rate of rental, minimum charge, and unit charge (royalty) paid by plaintiff under leases from defendant of shoe machines of all the types utilized by plaintiff has since 1935 been uniform except for (a) a restoration by defendant effective December 1, 1946 of unit charge rates on the USMC Staple Side Lasting Machine, Model B to .006¢ per pair, previously reduced by defendant effective January 1, 1939 to .005¢ per pair and (b) two increases put into effect by defendant applicable only to leases of new machinery or renewals of outstanding leases executed after the effective date of the increases; one such increase was effective May 1, 1947 and the other July 31, 1950. Each of the approximately 300 shoe manufacturing machines outstanding on lease by plaintiff from defendant at the time of the effective date of each of the foregoing two increases had either a ten-year term, or, in some cases, a five-year (renewal) term so that leases were expiring at various dates from less than one and up to ten years following the effective dates of these increases. The increased rates were payable and were paid by plaintiff only under renewal leases made following expiration of old outstanding leases or under leases on new machinery taken out after the effective date of said increases.

(Court Reporter's Note: This paragraph was offered in full by plaintiff at page 50 of the Transcript)

* * * * *

18. In the United States active competition has at all relevant times prevailed in the sale of men's dress and other shoes to the public at retail. In the distribution and sale of its men's dress and other shoes The Hanover Shoe, Inc. (through its subsidiary Sheppard & Myers,

Incorporated) competes principally at the retail level although, occasionally it has sold some shoes to J. C. Penney Co., Inc. and to the Armed Forces. Men's shoes sold to the public in retail competition in the United States are in the majority of instances sold in well-defined price brackets such as $4.95, $5.95, $6.95, $7.95, $8.95, $9.95 and so forth. In the case of a few retailers (including The Hanover Shoe, Inc. through its subsidiary Sheppard & Myers, Incorporated) men's shoes are sometimes sold at a price halfway between such as $4.50, $5.50, $6.50, $7.45, $8.45 and so on. The prices at which Hanover shoes have been sold at retail since January 1937 are shown in paragraph 14, above. Certain retailers, such as A. S. Beck (Shoe Corporation of America) and Sears Roebuck on occasions price their men's shoes at $8.99, $9.99, $10.99 and so forth. Montgomery Ward in its Spring 1957 catalogue prices some men's dress shoes at $5.98 and the majority of its men's dress line from $7.95 to $15.95. Retailers selling men's dress shoes have generally increased or decreased prices by amounts of $1.00 or occasionally 50 cents; but during the years 1938 through 1940 and again during the years 1948 and 1949 the Thom McAn (Melville Shoe Corporation) shoes and the Flagg (General Shoe Corporation) shoes have been increased or decreased in retail prices by amounts of 10 cents, 15 cents or 20 cents a pair. The Hanover Shoe, Inc., through its wholly owned subsidiary, Sheppard & Myers, Incorporated, has priced its men's dress shoes and other shoes for sale at retail, at prices that would be in line with prices of its principal competitors which have at various times been and are Flagg Brothers (General Shoe Corporation), Diamond-A. S. Beck (Shoe Cor-

poration of America), Hardy (General Shoe Corporation), Thom McAn (Melville Shoe Corporation), Father & Son (Endicott Johnson Corporation), Worthmore (International Shoe Corporation), Douglas (General Shoe Corporation), Regal (Brown Shoe Company), Sears Roebuck, Montgomery Ward and J. C. Penney Co., Inc. The names in parentheses indicate the shoe manufacturing concerns, frequently parent corporations associated with the named retail organizations. These shoe manufacturing companies employed various shoe machines under leases from United Shoe Machinery Corporation in the same form as the leases between plaintiff and defendant, with the exception that in and after 1955 the various shoe manufacturing companies purchased machines from United Shoe Machinery Corporation in different proportions.

## Order of Goodrich, J., Dated February 12, 1960 Denying Defendant's Motion to Dismiss Following Separate Trial [Opinion at 185 F. Supp. 826]

IN THE

UNITED STATES DISTRICT COURT

FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

Civil Action No. 5395

[SAME TITLE]

Upon consideration of the briefs and arguments of counsel for the respective parties and in accordance with the opinion in this matter filed today, it is decreed and adjudged that the motion by the defendant to dismiss should be and hereby is denied and that the case is to be set down for trial unless the defendant timely files a motion under Section 1292(b) of the Judicial Code.

HERBERT F. GOODRICH

Circuit Judge specially assigned for the Middle District of Pennsylvania for this case.

February 12, 1960

## Complaint

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF NEW YORK

Civil Action File No. 6841

W. B. COON Co.,

*Plaintiff,*

*vs*

UNITED SHOE MACHINERY CORPORATION,

*Defendant.*

### JURISDICTION

1. This action arises under Section 2 of the Act commonly known as the Sherman Act, 26 Stat. 209, U.S.C., Title 15, Sec. 2 and under Section 4 of the Act commonly known as the Clayton Act, 38 Stat. 731; U.S.C. Title 15, Section 15.

### PARTIES

2. The plaintiff, W. B. Coon Co., is a corporation organized and existing under and by virtue of the laws of the State of New York, and has its principal office and place of business at Rochester, New York.

3. The defendant, United Shoe Machinery Corporation, hereinafter referred to as United, is a corporation organized and existing under the laws of the State of New Jersey, and has its principal office and place of business at 140 Federal Street, Boston, Massachusetts. The defendant also transacts business in the Western District of New York, having an office and place of business at

1461 Monroe Avenue, Rochester, New York, and may be found within said Western District.

THE PRODUCT AND COMMERCE INVOLVED

4. Since 1899 United or its predecessor has been continuously engaged in the manufacture and distribution of shoe machinery. The principal part of such shoe machinery is manufactured at United's factory at Beverley, Massachusetts, and is distributed in interstate commerce to shoe manufacturers, including the plaintiff. Shipments were made to W. B. Coon Co. at its principal factory at Rochester, New York, and at its other factories at Cuylerville, New York, and Geneseo, New York.

5. W. B. Coon Co. is now and, prior to 1899, has been engaged in the manufacture and sale of women's and juvenile shoes. Most of the operations of importance in the making of these shoes are done by machine and W. B. Coon Co. cannot engage competitively in quantity production of such shoes without such shoe machinery.

6. The operations involved in the manufacture of women's and juvenile shoes by W. B. Coon Co. and other shoe manufacturers are known as upper cutting, upper fitting, sole leather, lasting, bottoming, making, finishing and packing. These operations, briefly described below, are conducted in seven departments at the shoe factories of Rochester, as follows, and some or all of the United machine types listed in paragraphs 7 through 13 below have been used by W. B. Coon Co. since 1912.

7. *Cutting Department.* Upper cutting is done in this Department. This consists of cutting the various parts of the shoe upper and linings. The parts of the upper

(such as vamps, quarters, tips, stays, tongues and ornaments), are usually cut out from leather and fabric by clicking machines and clicking dies. In addition to the shoe uppers, the linings are also cut. Uppers and linings are matchmarked, sorted into pairs and stamped for size and case numbers, the latter being for factory identification throughout the remainder of the manufacturing process. The following United machines are used by W. B. Coon Co. in these operations:

Ideal Clicking Machine
Marking Machine, Model A
Marking Machine, Model B

8. *Fitting Department.* Upper fitting is done in this Department. This immediately follows the cutting operations. It includes a wide range of operations by means of which the separate parts of the upper and lining are prepared and assembled to make the completed shoe upper. The number and sequence of operations vary greatly and are in direct relation to the complexity of design and to the type of shoe being produced. If the shoes are eyeletted, a temporary thread lacing is inserted in the eyelet holes by a lacing machine. This is for the purpose of retaining the shoe shape during the subsequent operations. The following United machines are used by W. B. Coon Co. in these operations:

Duplex Eyeletting Machine
Eyeletting
Ensign lacing
Lacing
Skiving
Thermo cement fold
Rapid Folding

9. *Sole Leather Department.* Sole leather is the preparation of bottom stock for the shoe. The principal shoe parts prepared are outsoles, insoles and platforms (which are cushioned insoles) but they may also include counters, box toes, heels and welting. The operations largely involve cutting and shaping the materials used, and applying adhesives or stiffeners to the various parts. The following United machines are used by W. B. Coon Co. in these operations:

Economy Insole Lip Cementing
Economy Insole Channeling Machine
Insole Lip Cutting & Scoring Machine
Economy Insole Lipsetting
Summit Splitting Machines
Insole Rib Cementing, Model A
Insole Rib Reinforcing, Model B
Cementing
Sole Cementing
Apex Fleshing or Randing
Flexible Sole
Apex Welt Laying
Apex Feather Edge Shank Reduce
Shank Reducing
Outsole Roughing
Goodyear Insole Toe Snipping
Sole Splitting
Wiring
Pluma Skiving
Fibre Trimming
Unishank Moulding

10. *Lasting Department.* Lasting is the series of operations by means of which the shoe upper and lining are drawn tightly over the wood last on which the shoe is made, and fastened to the insole of the shoe. This operation causes the upper to conform to the shape of the last, imparting thereby the desired style and fit characteristic to the finished shoe. The work of lasting consists of positioning the insole, upper (including all lining materials), box toes and counters in correct relation to one another; in stretching the upper; and in fastening the entire structure together. The upper must be conformed to the last with a high degree of skill. The following United machines are used by W. B. Coon Co. in these operations:

Rex Assembling Machine
Celastic Conditioning Machine
Lasting Machine, No. 7
Heel Seat Lasting
Staple Sidelasting
Rex Pullover
Insole Tacking, No. 1
Insole Tacking, No. 3
Upper Trimming
Toe Lasting
Staple Fastening
Pasting
Goodyear Upper Staple Tack Pull
Cement Spraying Unit
Toe Trimming
Insole Heel Seat Trim

11. *Making Department.* Bottoming and making are done in this Department. Bottoming, includes a series of operations by means of which the shoe bottom is prepared and the outsole is permanently attached to the lasted upper of the shoe and it may include some operations upon the

outsole which are performed after attaching. Construction of the Goodyear Welt shoe requires that the welt be sewn on, the surplus upper material be removed (inseam trimming), the welt be beaten out flat and trimmed off and beveled at the heel breast line, and the outsole and welt be rough-rounded to approximately final shape. Some of the above operations apply to cement shoe construction. The final operation in bottoming generally is leveling, which is performed by machines which apply considerable pressure to the sole bottom either by means of a progressive roll or a matrix form. This operation compacts the shoe bottom and produces the desired smooth contours of the sole surface.

The following United machines are used by W. B. Coon Co. in these bottoming and making operations:

Goodyear Welt Beating & Slashing
Bottom Cementing
Goodyear Universal Rounding & Channeling Machine
Fibre Fastening Machine
Goodyear Sole Leveling
Goodyear Outsole Rapid Lockstitch
Loose Nailing No. 2
Inseam Trimming
Goodyear Rapid Bobbin winding
Universal Heat Activating
Goodyear Welt Butting & Tacking
Goodyear Welt Sewing
Solvent Applying
Sole Cement Applying
Sole Attaching Machine U.A.
Upper Trimming
Lasted Bottom Ironing
Goodyear Inseam Sewing
Goodyear Sole Laying

12. *Finishing Department.* Finishing is the giving of a thorough treatment to the entire shoe bottom surface to make it attractive in appearance and the heels are permanently attached. The bottom treatment consists of a variable combination of operations according to quality and effects desired and includes buffing and the application of different finishes. The following United machines are used by W. B. Coon Co. in these operations:

McKay Automatic Heel Loading & Attaching
Edge Setting and Wheeling
Naumkeag Buffing
Stitch & Upper Cleaner
Xpedite Finishing
Ultima Heel Trimming
Wood Heel Attaching
Heel Scouring

13. *Packing Department.* In the Packing Department operations are performed which gives shoes their final treatment before being packed in boxes. The following United machines are used by W. B. Coon Co. for these operations:

Embossing Machine
Wood Heel Nailing
Screw Remover
Boothco Trimming
Wood Heel Nailing

THE VIOLATION OF LAW COMPLAINED OF:

14. Prior to and continuously from the year 1912 the defendant, United Shoe Machinery Corporation, has been violating the antitrust laws of the United States, by:

(a) Monopolizing interstate trade and commerce in the shoe machinery industry of the United States;

(b) Monopolizing interstate trade and commerce of the United States in substantially all shoe machinery required and used by W. B. Coon Co. in the manufacture of women's and juvenile shoes.

15. Monopolization by United as aforesaid and the exercise by it of its monopoly powers has enabled United to dominate and control the market in the shoe machinery, to restrict actual competition and to exclude potential competition in said market.

THE PRINCIPAL MEANS USED TO ACCOMPLISH THE VIOLATION OF LAW:

16. At all times prior to May 17, 1954, the date of the decision of the United States Supreme Court affirming a judgment that United violated Section 2 of the Sherman Act by monopolizing the shoe machinery trade and commerce among the several States, United declined to sell most of its shoe machines and made such machines available to shoe manufacturers only upon leases which reserved to United the sole and exclusive property in the machines and which granted to lessees the right to use the machines only for the purposes specified in the leases. At all times prior to said May 17, 1954, United offered on lease only all of the machines used by W. B. Coon Co. in the operations described in paragraphs 7 through 13 above and listed in these paragraphs.

17. United's leases for most of its machines, including all such leases between United and W. B. Coon Co., pro-

vided for the payment by shoe manufacturing lessees of flat rental charges or of so-called unit charges based upon the number of shoes upon which the machines were used or upon the number of operations performed by the machines. Leases for the rest of its machines, including all such leases between United and W. B. Coon Co., provided for the payment of both rental and unit charges. Where unit charge machines were adaptable for more than one kind of operation, separate charges were assessed by United for each kind of operation.

18. At all times prior to said May 17, 1954, all leases of United, including all leases entered into between United and W. B. Coon Co., included the following provisions which, alone or in combination with one or more of the others, deter and prevent shoe manufacturing lessees, including W. B. Coon Co. from replacing with a competitive machine each of the shoe machines leased from United.

(a) That the lessee shall use the machine for a fixed period of time, never less than 10 years, subject to renewal for a period of not less than five years; that upon the expiration of the original term or the renewal term, the leases provided that the machinery shall continue under the lease indefinitely subject to the right of United or the lessee to terminate the lease upon 60 days' notice. In practice United did not lease the machinery, subject to termination on 60 days' notice but required the execution of a further renewal lease;

(b) That the lessee of each unit charge machine shall use the machine to its full capacity upon all

shoes made by the lessee upon which the machine is capable of being used;

(c) That the lessee of each unit charge machine shall use the machine each month upon a stipulated minimum number of pairs of shoes, and shall pay to United a stipulated sum of money at the conclusion of each month during which the machine is not used upon said minimum number of pairs of shoes;

(d) That upon termination of the lease the lessee shall surrender the machine to United in good order and condition, shall reimburse United for the cost of all broken or missing parts, and shall pay to United a stipulated sum of money, called a deferred payment or return charge, varying in amount according to the machine leased from about 30% to 40% of the manufacturing cost plus the developmental cost of the machine type, although there is no fixed formula by which the amount is determined.

19. Beginning January 1, 1923, United, by written notice to its lessees established a plan whereby a stated percentage (2% from January 1, 1923, increased to 3% beginning February 1, 1927 and to 4% beginning August 1, 1939) of all unit charges, rentals and minimum charges on a machine were set aside by United to the credit of the lessee solely for the purpose of being applied by the lessee, if the lessee desired, to deferred (or return) payments and, since 1939, to payments for use of the machine less than minimum that might be due or become due under the terms of the lease on that machine or on other machines under lease in the factory. The amount so set aside by

United to the credit of the lessee is commonly known as the "right of deduction fund."

20. In the event that any lessee, including W. B. Coon Co. has desired to return a United machine to be replaced with another United machine, United permits such return upon payment by the lessee, as required under United's leases, of the cost of transportation of such machine to United at Beverley, Massachusetts, the cost of replacement of all broken or missing parts at the regular prices established by United therefor and the return charge established for such machine in the lease. Where a lessee, including W. B. Coon Co., wished to return a United machine solely to replace it with a competitor's machine, United permits the return only on the payment, in addition to the items just stated, of an adjustment or commutation of sums that would have accrued thereafter which is calculated, in the case of a machine leased without any unit charge, at 25% of the monthly rentals payable for the balance of the term and, as to a machine leased in whole or in part on the basis of unit charges, at 50% of the minimum monthly payment for the balance of the term after the waiver of four months for each of the remaining years of the term; that these charges are, at the lessee's option, payable in cash or charged against the right of deduction fund.

21. Although not required to do so by its leases, United has at all times undertaken to repair its machines without extra charge to the lessee except for such parts as are required. As a result no independent repair or service organizations have been able to grow up, and potential or existing competitors of United in the manu-

facture of shoe machinery must either offer repair service with their machines or suffer the competitive disadvantage of marketing machines to shoe manufacturers, all of whom know that repair service will be difficult to provide.

22. As a further means of preventing competition, excluding competitors and expanding its share of the market, United has, where faced with competition in the marketing of one or more types of shoe machinery made by it, adopted, among others, the following practices:

(a) Reduced its own rates on the machinery type or types threatened by competition;

(b) Introduced new models at lower rates than for comparable old models;

(c) Maintained rates on a particular machine type despite a policy of increasing rates on other machine types to meet increased costs of manufacture;

(d) Introduced new models so designed and priced as to reach only that area of the shoe manufacturing industry in which a competitor is attempting to market a machine.

EXTENT OF UNITED'S MONOPOLY AND CONTROL OF MARKET:

23. By means of the unlawful conduct hereinbefore described, United has placed in shoe factories most of the shoe machinery used in the manufacture of shoes in the United States. United supplies from 75% to 100% of almost all of the different types of shoe machinery used in the United States, exclusive of dry thread sewing machinery.

24. The following types of shoe machinery (more particularly identified in paragraphs 7 through 13 above) are required by W. B. Coon Co. in the manufacture of women's and juvenile shoes and are or have been leased by W. B. Coon Co. from United. United supplied approximately the following percentages of the total of all such machines in American shoe factories about May 1, 1947:

| Machine Types | United's Share of Total Shoe Machinery in Shoe Factories in the United States as of May 1, 1947 |
|---|---|
| Clicking | 97 |
| Eyeletting | 81 |
| Pulling Over | 99 |
| Bed Lasting | 99 |
| Heel Seat Lasting | 99 |
| Staple Side Lasting | 99 |
| Welt Toe Lasting | 100 |
| Welt Sewing | 97 |
| Inseam Trimming | 99 |
| Outsole Laying | 91 |
| Rough Rounding | 98 |
| Outsole Stitching | 92 |
| Cement Sole Attaching | 40 |
| Loose Nailing | 98 |
| Fibre Fastening | 100 |
| Leather & Rubber | 98 |
| Wood Heel Nailing | 83 |
| Wood Heel Attaching | 96 |
| Slugging | 91 |
| Cement Shoe | 63 |
| Eyeletting | 100 |

| Machine Types | United's Share of Total Shoe Machinery in Shoe Factories in the United States as of May 1, 1947 |
|---|---|
| Fitting Room | 58 |
| Goodyear | 88 |
| Healing | 83 |
| Lasting | 88 |
| Pulling Over | 97 |

EFFECTS OF UNITED'S MONOPOLY:

25. The aforesaid practices and conduct of United, its monopolization of interstate commerce in shoe machinery, the restriction of existing competition and exclusion of potential competition in the manufacture, leasing and sale of shoe machinery has had the following effects on W. B. Coon Co.:

a. W. B. Coon Co. has been prevented from acquiring shoe machinery, new or used, as owner either from United or elsewhere to his giving in the sum of $341,597.82.

b. United has extracted from W. B. Coon Co. for the use of its shoe machinery large sums of money in excess of the reasonable value of such machinery and of the service rendered on said machinery and in particular by the requirement imposed by United on it to repay return charges on machinery returned by W. B. Coon Co. to United to its damage in the sum of $25,000.

26. As a result of the foregoing monopolization in violation of the antitrust laws and as a result of the acts

done in furtherance of such monopolization, W. B. Coon Co. has been damaged in the sum of $366,597.52."

WHEREFORE, plaintiff asks that judgment be entered against the defendant hereinabove named in the sum of $1,099,792.76, being three times the actual damage suffered by plaintiff and that in addition plaintiff recover a reasonable attorney's fee and costs as provided by statute.

NIXON, HARGRAVE, DEVANS & DEY,
By /s/ W. CLYDE O'BRIEN
W. Clyde O'Brien, A Partner
Attorneys for Plaintiff,
31 Exchange Street
Rochester 14, New York.

Dated: December 30, 1955.

**Decisions**

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF NEW YORK

Civil No. 6841

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W. B. COON CO. and CHARLES J. BRIGGS, as ASSIGNEE FOR THE BENEFIT OF CREDITORS,

*Plaintiffs,*

*vs.*

UNITED SHOE MACHINERY CORPORATION,

*Defendant.*

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This case was tried before the undersigned at Rochester, N. Y., on September 5, 1962.

NIXON, HARGRAVE, DEVANS & DEY, Rochester, N. Y., Attorneys for Plaintiffs; W. CLYDE O'BRIEN, *of Counsel;*

HARRIS, BEACH, KEATING, WILCOX, DALE & LINOWITZ, Rochester, N. Y., and DAVIS POLK WARDWELL SUNDERLAND & KIENDL, New York City, Attorneys for Defendant; EDWARD R. MACOMBER, Rochester, N. Y., and RALPH M. CARSON, New York City, *of Counsel.*

FINDINGS OF FACT

1. Plaintiff, W. B. Coon Co., is a New York corporation. For many years it was engaged in the manufacture of shoes with its principal place of business at Rochester, N. Y.

2. On April 11, 1958, W. B. Coon Co., made an assignment for the benefit of creditors, pursuant to the Debtor and Creditor Law of New York, to Charles J. Briggs, Assignee, one of the plaintiffs herein. The assignment included all of its assets, including the claim set forth in this action. Charles J. Briggs, as assignee, is the owner and holder of such claim.

3. The defendant, United Shoe Machinery Corporation, is a New Jersey corporation. It has its principal place of business in Boston, Massachusetts, and is engaged in the manufacture and distribution of shoe machinery.

4. For many years prior to the commencement of this action W. B. Coon Co. was a customer of the defendant. It leased and used shoe machinery from the defendant under a uniform lease agreement known as the Form A lease.

5. Before January 1, 1955, the defendant offered to shoe manufacturers, including W. B. Coon Co., certain machines on a lease-only basis, and certain other machines on a lease or sale basis. The latter machines were sometimes referred to as "optional terms machines."

6. After January 1, 1955, pursuant to the decree in *United States* v. *United Shoe Machinery Corporation*, 110 Fed. Supp. 295, Dist. Mass. (1953), affirmed 347 U. S. 521, (1954), the defendant made available to shoe manufacturers, including W. B. Coon Co., for sale or lease, machines which previously had been available for lease only.

7. After January 1, 1955, pursuant to the said decree, the defendant made available to lessees of its shoe machin-

ery, including W. B. Coon Co., a plan whereby said lessees could purchase the machines then held under Form A lease. The procedure was entitled, "Plan for Terminating Form A leases."

8. After January 1, 1955, when W. B. Coon Co. had the option of terminating its Form A leases and of purchasing the machines covered thereby, it elected to continue some of the Form A leases until their expiration and then to lease the machines again on Form B leases, rather than to purchase the machines.

9. At various times after October 2, 1939, and before the commencement of this action, W. B. Coon Co. held certain machines on Form A leases which were then available for sale.

10. There is no evidence that at any time after October 2, 1939 W. B. Coon Co. would have purchased machines from the defendant, had such machines been available for purchase. There is no evidence that at any time after October 2, 1939 W. B. Coon Co. had available, or was in a financial position to enable it to borrow, the substantial amounts as set forth in plaintiffs' damage claim as necessary to purchase the shoe machinery involved.

11. Shoe manufacturers, including W. B. Coon Co., enjoyed the following benefits from the defendant's leasing system in effect prior to the decree in *United States* vs. *United Shoe Machinery Corporation (supra)*:

(a) it enabled a person or company with comparatively modest capital and with something less than superior efficiency to become a shoe manufacturer,

(b) it enabled persons or corporations to obtain machines for shoe manufacture without purchasing them,

(c) it facilitated repair service and maintenance of leased machines without separate charge,

(d) it afforded a convenient method of exchange of an older United model for a new United model,

(e) it made possible the ability to change from one process to another,

(f) it provided a close approximation of machinery costs per pair among competing shoe manufacturers.

12. There is no evidence that W. B. Coon Co. or any other shoe manufacturer was dissatisfied with the defendant's leasing system in effect up to February 18, 1953, the date of the decree in United States vs. United Shoe Machinery Corp., nor is there any evidence that the features of defendant's Form A lease, a ten-year term, a full capacity clause, the deferred payment charges, or repair service without separate charge—were the proximate cause of any injury or damage to the plaintiffs.

13. There is no evidence of the excessiveness of any of the defendant's rental or unit charges or any other charges in connection with Form A leases for any particular machine.

14. There is no evidence that the defendant secured a monopoly profit on its total operations, or on its machinery branch as a whole.

15. There is no evidence that the plaintiffs computed purchase price for machines which were leased on or after October 2, 1939 would have been a fair and reasonable purchase price at the date of the lease had the same machines then been offered for sale.

16. There is no evidence that the machines held on lease on and after October 2, 1939, and returned to the defendant, would have been repurchased by the defendant or by any other person or company for the computed salvage value as set forth in plaintiffs' computation of damages.

17. There is no evidence that the plan for terminating Form A leases as prepared and presented under the decree represented a proper discount table for the resale price of the salvage value of any machine then held by W. B. Coon Co., for the purposes or in connection with the plaintiffs' computation of hypothetical sale prices for leased machinery.

18. There is no evidence of the salvage value of any machine at the time of its return to the defendant under lease or on hand at the W. B. Coon Co. plant as of December 31, 1954, as set forth in the plaintiffs' computation of damages.

19. There is no evidence of the cost of capital or required return on investment to W. B. Coon Co. if the said company had used its own funds to purchase machines held on lease.

20. There is no evidence that the cost to W. B. Coon Co. of maintaining its machines, if the said company had owned such machines, would have been 6.6% of the total

rental payments paid by W. B. Coon Co. to defendant, as set forth in the plaintiffs' computation of damages.

21. There is no evidence of "estimated return charges" of $20,070.78, as set forth in the plaintiffs' computation of damages.

22. The following subsidiary corporations held machinery on lease from the defendant which were separate from the leases held by W. B. Coon Co.: Wilbur Coon Juvenile, Inc., Coon Juvenile, Inc., Genesee Valley Shoe, Inc., and Foot Caress, Inc.

23. There is no evidence that the above named corporations were in any way integrated or a part of W. B. Coon Co. in the manufacture of shoes or the leasing of shoe machinery from the defendant.

24. There is no evidence supporting the tabulations set forth in the plaintiffs' computation of damages which would indicate that they are true or accurate as computations of a purchase price for defendant's machinery leased by W. B. Coon Co., or of a difference between such purchase price and W. B. Coon Co.'s aggregate rental and royalty payments, nor is there any evidence that the tabulations set forth in the plaintiffs' computation of damages based thereon represent any damage sustained by W. B. Coon Co.

## Conclusions of Law

1. W. B. Coon Co. sustained no injury to its business or property by reason of any acts of the defendant in violation of the antitrust laws.

2. Any acts of the defendant held by the court in United States vs. United Shoe Machinery Corp. to be in violation of the antitrust laws were not the proximate cause of any injury to the business or property of W. B. Coon.

3. Plaintiffs have not proved any violation of the antitrust laws relevant to the cause of action set forth in the amended complaint herein.

4. The New York six-year statute of limitations, Civil Practice Act, Sec. 48, which is applicable herein, as extended by the Federal tolling statutes (56 Stat. 781, 59 Stat. 306), bars recovery by the plaintiffs with respect to leases executed by W. B. Coon Co. with defendant before October 2, 1939, and during the period between October 10, 1942 and June 22, 1943.

5. The Form A leases between W. B. Coon Co. and the defendant during the period 1939 through 1954 were not by themselves illegal.

6. Defendant's policy of lease-only as to certain machines during the period 1939 through 1954 was not by itself illegal.

7. W. B. Coon Co. sustained no damage.

8. The defendant is entitled to judgment of dismissal upon the merits of the claim of plaintiffs and each of them.

HAROLD P. BURKE
U. S. District Judge

April 12, 1963.

## Testimony

[15] LAWRENCE B. SHEPPARD, called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

*Direct Examination by Mr. Hayes:*

Q. Where do you reside, Mr. Sheppard? A. Hanover, Pennsylvania.

Q. What is your occupation? A. I am a shoe manufacturer.

Q. Are you connected with the plaintiff in this action? A. I am.

Q. In what capacity? A. Presently chairman of the board of Hanover Shoe, Inc. and president of Sheppard & Myers, Inc., a totally-owned subsidiary of the Hanover Shoe.

Q. How long have you been connected with the plaintiff, Mr. Sheppard? A. 41 years.

Q. It goes back to 1921? A. Yes, sir.

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*Lawrence B. Sheppard—Direct*

Q. That's right. A. Yes.

Q. Now, of those machines—let me ask you [26] a preliminary question first. Did Hanover use those United machines which were needed in the Goodyear welt process? A. What was the first two words of that question, did Hanover?

Q. Yes, those machines which it needed in the Goodyear welt process. A. Yes.

Q. And as to those machines, were some of them simple machines and others complicated machines? A. Yes.

Q. Speaking generally, now, were the complicated or not simple machines available from United on a purchase basis? A. Not many, if any. You are still talking about 1921?

Q. That's right. A. Very few, if any, I recollect.

Q. Were they available only on a lease basis, the complicated machines? A. Yes.

Q. And did that condition continue down through into 1955, the availability of machines from United, the more complicated machines on a lease-only basis? [27] A. The more important machines, the more vital machines in making welt shoes, that did continue. And some of what I care to refer to as minor, more or less important, minor machines, they were available on lease with an option to buy. Many of them were.

Q. Now, from your experience in Hanover, are you acquainted with the process of making a Goodyear welt shoe? A. Yes, sir.

[28] Q. Could you describe that process to the Court? Are you able to do so? A. I am sure that I could describe the higher points in the major operation—

Q. Have you—pardon me. A.—unquestionably I have forgotten some of the little minor operations. It has been variously estimated that there are between a hundred and two hundred operations in making a pair or fine Goodyear men's welt shoes. I have counted them in bygone days and never came out with the same answer, but it is a complicated process.

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[54] *By Mr. Hayes*:

Q. You mentioned that when you first came with Hanover the bulk of the machines in the factory that were used

in the shoemaking process were United machines. A. That's correct. Yes, sir.

Q. Speaking generally, that continued down through 1955? A. Generally speaking, yes. There were some exceptions to it.

Q. Now, you also testified that the major or most complicated, or call it what you will, machines were available only on a lease basis and could not be purchased; do you recall that? A. Yes, sir.

Q. And did that continue, that situation, down to mid-1955? A. Yes, sir.

Q. Did Hanover, during the period that you were with the company, make any effort to obtain from non-United sources comparable machines which it could purchase? A. Yes, we did.

Q. Well, let's take at the beginning, take [55] in the early '20s, when you were first with the company. Can you tell us what efforts you made, or what investigations you made, in an endeavor to find machinery available for the welt process that you could purchase? A. Well, I don't know as I can describe investigations that took place 40 years ago. I had better tell you some of the things we did. We bought some Reece machines, 10 or 20 of them, to try to substitute for the United clicker, and we used those machines for three or four or five years. They really were not satisfactory. They had heavy beams, heavy as to the operator. They had to keep swinging them back and forth. They had a foot treadle which was somewhat dangerous in case he got his finger under the beam and about that time touched it with his foot, and the United machine was much safer. We did buy, I believe, 11 of those Reece clicking machines.

Q. And did you later abandon their use? A. Yes, we did.

Q. And go back to United clickers? A. Yes, sir. I think we kept two or three of them longer cutting cloth linings, but we eventually [56] abandoned all of them within five or six years, I can't tell you just how long.

Q. Did you visit other welt shoe factories in the '20s or '30s— A. Yes.

Q. —in an endeavor to locate machines that you could purchase? A. Well, in an endeavor to see if there was anything new that could be purchased, and so forth, but of course, also to see their shoemaking and try to improve my own, both, a combination.

Q. Do you remember some of those factories? A. Yes, I can remember very well my early visit to Nunn-Bush, and Mr. Henry Nunn himself was living, which is what makes it stand out in my mind. Nunn-Bush have always made very fine shoes, and still do. I was out there twice, I think, in the early '20s, once perhaps in 1921 or '22, right after I went to work, and another time, three or four times, a year later.

I visited Florsheim's. I remember that quite vividly because there is where I met and got to know Mr. Irving Florsheim, who afterwards became president of Florsheim Shoe Company, and that [57] friendship continued some of those years. I am just stating some of the reasons those visits stand out in my mind.

I went to some New England factories over a course— about a course of several years now.

Q. That's right. A. I went to Endicott Johnson's a couple of times, and Freeman of Beloit, Wisconsin. No doubt many others.

Q. Can you name any of the New England factories that you visited? A. Yes. I visited the old Douglass plant when they were in their heyday making about 9,000 pairs of men's shoes a day, or something like that. I don't pretend to be accurate, but it was a large quantity, I remember it very well. And some other smaller factories in New England. I can't immediately recall.

Q. Now, did that search which began in the '20s continue down through the years, down to 1955? A. You mean the search for machinery that could be purchased?

Q. Correct. A. Oh, yes, that still was continued through [58] 1955, all through the years, more or less intensively, but it is still continuing today.

Q. Can you tell us some of the efforts that were made coming down now through the war or post-war period in an endeavor to find machines that could be purchased that would be comparable to the United machines you were leasing? A. During World War II that was more or less dormant; there wasn't very much that could be done about it for a couple of reasons. First, we were all intent on the war and making war material and, secondly, because the war effort was requiring practically all the machine facilities in the country, and in Europe too, for that matter, so it was at more or less of a standstill from about—guessing again—the time the war broke out in Europe, a year or two before '42.

However, there was conversation when shoe men gathered, as there is always a matter of conversation when shoe men gather, but the only way we have to transmit our views to each other is not much of a press and trade magazine that does that, and we are gossips, and I am confessing that we are great gossips in exchanging information.

[59] Q. I don't hear you. A. I am confessing the personnel of the industry are great gossips. We compare notes whenever we get together a great deal; it's a habit.

Well, there was some talk toward the end of the war that, if the war ever ends, we must try to do something about perhaps some foreign machines that could become available, and we all surmised at that point—

Q. Let me interrupt at that point.

Did you spend your full time in the Hanover factory during the war? A. No, I spent very little of it.

Q. Where were you during the war? A. Most of the time I was in Washington, and the other time I was overseas.

Q. And what were you doing in Washington? A. I was with War Production Board, in the Hide, Leather and Shoe Division, and our chief duty there was to try to implement supplies of military—production of military shoes.

Q. And you went to Europe, you said. What did you do there? A. Well, I was requested to go there by the [60] headquarters staff of SHAEF.

Immediately following the Bulge, we had terrific incidence of trench foot, which is a very serious thing. Trench foot, they say, will permanently incapacitate more men from returning to active duty than bullet wounds.

At the time I was sent for, which was in the latter part of January—

Q. 1945? A. 1945—we had some 40,000 cases of trench foot, hospitalization. And before the middle of March it had gone up to some 75,000 or 80,000, which meant there were over five divisions, fighting divisions, incapacitated, and there was a good deal, apparently, of mystery as to

what caused trench foot. Of course, the doctors knew a great deal—that it was not just necessarily temperature. You could acquire trench foot in 40-degree temperature, provided you had your feet wet for two or three days and were pinned down in a foxhole.

My summons to come over there came, as I said, from SHAEF, sent by General Lee, who was General Eisenhower's assistant, so I went.

Q. That was in connection with an investiga- [61] tion as to how to prevent trench foot? A. That, and what we were doing to cause it.

Q. Now, I interrupted you to cover your war period. You had just mentioned that after the war you had developed an interest in the possibility of obtaining foreign machines. Will you carry on as to what you were going to say in that connection, Mr. Sheppard? A. Well, that thing developed in numerous and sundry ways. Various machine agents in this country got into the act, uncovered some machines for which they could get the agency and bring it over here.

Q. You speak of machine agents. Do you mean American firms who had agencies representing foreign machine manufacturers? A. That's what it amounted to. There were several of them. The one that stands out in my mind is the fellow named Schwabe, who had, I don't know how many, lines of various machines, or claimed he did, and did have some, to my knowledge, and others. And foreign machines started to come in here on trial, and we tried—we and some others tried—quite a few of them.

[62] Q. You say this was after the war. Can you fix more definitely a time than just after the war? A. The time when it all began? Well, I'm afraid I'd be guessing somewhat, but a good guess would be '48 or '49, I think.

Q. All right. Proceed, Mr. Sheppard. A. The National Shoe Manufacturers Association, at the insistance of its members and directors, began to take an interest.

Q. Will you tell the Court who is the National Shoe Manufacturers Association, or what is it? A. The National Shoe Manufacturers Association is a trade association in the shoe industry, and at one time we claimed a membership representing some 85 or 90 per cent of the shoe production. I hope that's accurate, but it is somewhere near accurate. I was president of it from late 1945 through 1949, and that's how I placed the recollection I have just stated previously.

Then, as I recall it, either just before my term of office expired or just afterward—I am hazy on that recollection—the National Association formed a so-called technical committee, of which I [63] was a member. That committee's duty then was to search and disseminate information for modern shoe machinery wherever it could be found and to assist manufacturers in evaluating it, disseminate information to the members, and so forth and so on, as near as I can recollect.

Q. About how many members were there of this technical committee? A. I am sorry, I am guessing, but I would say about a dozen; 10 or 12.

Q. Can you name some of them and tell us what companies they were connected with? A. Yes. Well, Sam Slosberg comes to mind; Mr. Charlie Johnson—

Q. Would you name their companies too, Mr. Sheppard? A. I will try. They make children's shoes—Slosberg makes children's shoes, and I think it is called Green Shoe Company, I am not positive.

Mr. Charlie Johnson, of course, was president of Endicott Johnson, the second largest shoe manufacturer in the world at that time.

Mr. Byron Gray, at that time either the president or the chairman of the board, I have for- [64] gotten which—there was a change made in there—president of International, the largest shoe company in the world.

Warren Reardon from the New England states, and I can't tell you the name of his company; I should be able to, but I can't.

Q. Is Mr. Stewart a member of that committee? A. Yes, sir, Weir Stewart. They were from Syracuse, I think.

Q. Did Mr. Stewart succeed you as president of the Shoe Manufacturers Association? A. Yes, he did.

Q. What did this technical committee do? A. Well, they—

Q. First of all, let me ask you: is this the committee that you guessed was organized somewhere around the end of your term office or the beginning of Mr. Stewart's, somewhere around '49 or '50? A. Very late '49 or early '50.

Q. Finish. Tell us what the committee did, Mr. Sheppard, if you will. A. I don't mean to be facetious, but they talked a lot first, and they tried to get organized and tried to perform their duties; and among other [65] things they did, about that time I think there were rumors of an increase in royalties—

Q. Increase in royalties on what, by whom? A. On shoe machinery, by the USMC. And I think that perhaps distracted them a little while from their other investigations, and so forth, and they pursued that in protesting the raise in several meetings.

Q. Were you a partner to that protest? A. Yes.

Q. Do you recall the year in which that took place? A. I think it first started in somewhat of a protesting way, maybe mid-1950 or a little earlier than that.

Q. All right, proceed.

Let me ask you one question first, though. Was the protest successful or did the increase in rates go through? A. You mean ultimately?

Q. Successful. A. There were several meetings and quite a lot of work done by both sides. No, it was not successful, the increase went through.

[66] Q. All right. Now, what did the committee do with respect to endeavoring to discover non-United machinery which would be available in place of United's lease-only machinery? A. Well, of course, a lot of work, investigatory work on a big, broad problem was done in part under the direction of the committee but by the staff of the association, and at some time along this road they employed a full-time man who they considered a shoemaker, thoroughly versed in the problems of a shoe factory and had been a shoe factory superintendent for many years, and gave him the full-time job of exploring, searching and looking, and eventually he and his—part of this committee—I did not go, but a goodly part—went abroad.

Q. Is that the trip that took place in 1952? A. Yes, sir. They made quite an extensive study of French, German, Italian and English shoemaking and factories, machine availabilities, all that sort of thing.

To my list of the committee members, it just occurred to me, I would like to add Mr. Allan Cadwell of Freeman.

Q. Freeman Shoe Company? [67] A. Yes.

Q. By the way, who was this expert that was employed? A. A fellow by the name of James Nolen.

Q. All right, proceed, Mr. Sheppard. A. It is not clear to me just what you—which direction you want me to proceed.

Q. Well, after the committee made its trip abroad, did it report on its findings? A. Yes; in detail to the membership through the trade association, and in special reports to the membership, and in about every other way they could they tried to disseminate the information that they had acquired and did disseminate it pretty well. They gave us a lot of leads. They did not pretend to sit in judgment as to whether a particular machine would do the standard of work required by a particular American manufacturer. They described the machines as well as they could, either in meetings or through circulation of data, and then it was up to the manufacturer to decide whether he wanted to go through the expense of trying one or more of these various, numerous machines.

In the meantime, the people who had [68] acquired agencies for many of the foreign machines were busy trying to sell them to anybody that was interested.

Now, I think most everybody in our segment of the industry—I know nothing whatever about shoe production outside of men's welt shoes—

Q. When you say "outside," you mean you are talking about men's welt shoes? A. That's right. It doesn't mean some of the machines cannot be adapted back and forth to other makes, but I don't know much about them.

So between those that were most interested—and I have two or three in mind that I knew best—I don't say they were most interested; perhaps they were, perhaps they weren't—there was a lot of exchange of information between Hanover and Freeman in Beloit.

Q. Freeman Shoe Company you mean? A. Yes—which at that time was being run by Mr. Allan Cadwell, who was general manager of it; and some of our men did a good deal of talking with Weinbrenner, who was trying a lot of machines.

Now, what we would do, if we had this machine, they had that machine, we would exchange in- [69] formation as to how we liked it or did not like it or why.

Q. You are speaking now of the foreign machines; is that it? A. Yes, yes, entirely.

Q. Go ahead, Mr. Sheppard. You exchanged information, you said, a great deal with Weinbrenner and Freeman. A. That doesn't mean at all that I did most of it or—but I did do some of it.

Q. Who else in Hanover would engage in this exchange of information? A. The people that were responsible. Now, unfortunately, we lost a superintendent, Roy McDonald, who was, I think, in 1949—'48, '49. He started some of this, and then he was succeeded by Mr. Ray Purtell. But in the meantime—I can't tell you what year—Mr. Allan Cadwell came with us from Freeman.

Q. That was toward the end of the complaint period, was it not, in 1955 or late '54? A. I think it was. And he directed a lot of this investigation, trial and error. He was splendid on the subject, fresh from it and interested [70] because we were doing a great deal. I think that he directed that for a short period, at least, until he died, unfortunately.

Q. Was that Mr. Cadwell the same Mr. Cadwell who had been with the Freeman Shoe Company? A. That's right.

Q. Now, in addition to the exchange of information between Hanover, and its plant superintendents, and representatives of Weinbrenner and Freeman, you had available to you, I assume, the information that was obtained by the technical committee in Europe with respect to the foreign machines? A. Yes; so did they.

Q. I am sorry. A. So did these other companies.

Q. So did they.

Did you in addition have conversations with any members of the technical committee who made the trip to Europe? A. Oh, yes.

Q. With whom? A. Well, I remember going over Byron Gray's copious notes with him. He was the president of International or chairman of the board, I don't know [71] which. I talked at length with Warren Reardon. I talked at length with Allan Cadwell, who, I think, made that trip, I am quite sure.

I talked at length with Henry Boyd, Jr., who was then president of the General Shoe Corporation. I talked with Sam Slosberg. I talked at length at one time or another about this particular trip, which we would call the first trip.

Q. Was Mr. Nolen on that trip too? A. Yes.

Q. Did you have conversations with him? A. Yes, lengthy conversation at various times.

Q. Now, in addition, did Hanover have available to it, or did it receive, catalogs of the various representatives of European shoe manufacturers doing business in this country?

Mr. Carson: Excuse me. Can I have the question read back?

(Question read.)

A. If they had catalogs, I am sure we received them. I don't recollect seeing any myself. I have seen some circulars, such as or similar to these pictures we were discussing, purporting to be some [72] machine or another. I don't know that they had real catalogs. If they did, I didn't see them.

Q. And did Hanover subscribe to any trade publications that would carry advertisements with respect to foreign machines? A. Well, I think we have always subscribed to practically all of the trade publications, so if there were any advertisements, I presume they had been covered. I guess they were.

Q. Now, you went through a shoemaking process earlier this morning. What is the quality of the Hanover product? A. We think it is pretty good. I mean that.

Q. Yes, I know you do. A. I am not being smart. We try to use the better grades of shoes, best raw material that can be procured, and we think our standards are about as high as we can get them, which has always been endeavored.

Q. What about the leather that goes into your shoes? A. Well, we use some of the finest upper leather that is made, both domestic and imported. We are very proud of our sole leather, which is [73] tanned on contract and tanned longer, which is the old thought to make the best sole leather with a maximum of vegetable and a minimum of synthetic than most.

Q. Now, you have told us about the efforts made in broad scope over the years to learn about non-United machines which could be purchased and which could replace United's lease-only machines.

Mr. Carson: I object to that summary of the testimony. I don't think the witness should be led in that way.

The Court: Read the question.

(Question read.)

The Court: All right. I think you ought to rephrase your question. Don't lead the witness.

Mr. Hayes: I am trying not to, but I didn't think that was leading, as a matter of fact.

The Court: Maybe it isn't. It is a summary.

Q. Let me ask you this question: Did Hanover have a policy of purchasing machines—

Mr. Carson: I object to that as leading.

[74] The Court: I will overrule it. That calls for a yes or no answer.

Go ahead.

A. Yes.

The Court: What is the answer?

The Witness: Yes.

*By Mr. Hayes:*

Q. Would Hanover purchase a machine which was not as efficient as a United machine which was its counterpart?

A. I lost one or two words at the tail end of your question.

Q. No wonder, I even lost my thought.

Would Hanover purchase a non-United machine which was not as efficient as or would not do as good a job as its United counterpart?

Mr. Carson: I object to that as leading. I think counsel should ask what the policy was.

The Court: We will take it. Overruled. Go ahead.

A. I presume you are asking me if Hanover would purchase a machine that would not do the quality of work that the United machinery did; do I understand [75] your question?

Q. That is correct. A. No, they would not purchase it.

Q. Is that because of Hanover's requirement of high-quality performance and high-quality production? A. Was that "because of," did you say?

Q. Yes. A. Because of?

Q. Yes. A. Yes, to a certain extent it was. We have never given away on quality for convenience of material, or machinery, for that matter.

Q. Now, over the years, down to 1955, as a result of the search you testified was made and of the information you obtained, did Hanover find any non-United machines equivalent to United lease-only machines? A. What dates did you give me the range of?

Q. Down to 1955; machines of non-United manufacture which Hanover bought and tried and found to be at least the equivalent of United machines. A. There weren't many.

Q. Can you identify any? [76] A. Well, there were three that I can remember: a clicking machine, that's the upper leather clicking machine, and the sole leather dieing out machines, and a foreign sole laying machine.

Q. What clickers did you find— A. I hadn't quite finished my answer.

Q. I am sorry. A. And we found one other machine, a staple side lasting machine. We thought we had found

something, bought it and paid for it, but it didn't stand up and we discarded it later. That finishes my answer.

Q. So far as you can recall, those were the only non-United machines you found which at any time you thought were comparable to United's lease-only machines? A. That could be purchased.

Q. That could be purchased, yes.

Now, you mentioned clickers. Did Hanover buy clickers from other shoe machinery manufacturers? A. Yes.

Q. From what manufacturers or agents? You may not know the manufacturer. [77] A. I am not sure of the agents. We bought from Bata Machines, we bought another name that is familiar to me but I can't recall it, and we bought some so-called Schwabe machines. I don't know if Schwabe had his name on them.

Q. Was the other name Montreal? A. Yes, sir.

Q. And was that early in the period or toward the latter part of the period? A. That was very early in the period.

Q. Now, about the— A. I would like to correct that. What period are you talking about?

Q. The period of the complaint, up to 1955. A. No, it was at least part of the period, not the very end.

Q. Was it in the '50s? A. Yes.

Q. It was in the '50s that you found these various clickers? A. Yes.

Q. How about the sole leather dieing out, you said you found a machine there? A. We found those some years before, if I [78] recollect correctly.

Q. Was that in the '40s? A. Yes, early '40s.

Q. What machine did you find there that was comparable to the United? Do you recall the name? A. I am

trying to. I think a fellow named Mathey built some of those machines, and some of them were procured from Schwabe again, I think.

Q. Did you buy any Hammill [*sic;* should be Hamlin] dieing out machines? A. Yes, but I think that's the one Mathey sold.

Q. It is the same machine you have in mind? A. Same machine.

Q. Now the sole laying. That was in the '40s, you said. Take the sole layer; what was that machine that you found? A. That machine, according to my best recollection, was about 10 years ago, around '51, '52 or '53, and I think that that was a foreign machine.

Q. Do you remember the name? A. Albeko, but again I think Schwabe was the agent. I think they were purchased from Schwabe. I have no record of it.

Q. Did you buy any Lamac sole layers? [79] A. Yes. And I must correct my previous testimony, the Lomac [*sic*; should be Lamac].

Q. That was about 10 years ago? A. Yes. I don't know if Schwabe was in that picture or not. He was in almost every one for a while.

Q. You mentioned that you tried a staple side lasting machine that you obtained from Schwabe and was found unsatisfactory, that you purchased. A. Yes, and discarded it.

Q. Was that also in the '50s? A. It was in the '50s, yes.

Q. Do you recall the manufacturer— A. I think it was a Montreal.

Q. You don't recall the manufacturer? A. Not clearly, no. I think it was a Montreal.

Q. Now, aside from these three or four machines you mentioned, so far as the manufacture of Hanover shoes was concerned—I am speaking now of United's lease-only machines—were those machines the best machines available for the Goodyear welt process? A. You mean the machines we bought?

[80] Q. No, no, aside from those you bought from others, were the remaining United machines which you used and which you obtained on lease only the best available machines for your process? A. Unquestionably.

Mr. Hayes: If you will excuse me a moment, your Honor.

The Court: Certainly.

(Discussion off the record.)

Mr. Hayes: I would like to have marked for identification—these were obtained by us on inspection of defendant's records in Boston—five outside manufacturer installation reports, commonly referred to as OMIRs. One is dated September 20, 1951, two dated September 21, 1951, one dated September 27, 1951, and one dated October 30, 1951. I would like to offer them as a single exhibit, and I understand from Mr. Carson that he does not object to that technique.

The Court: All right.

Mr. Carson: No objection.

(Marked Exhibit P-22 for identification.)

Mr. Hayes: I would like, with the Court's permission, to refer to certain information.

[81] The first, dated September 20th, has to do with the report that Hanover Shoe had three

trimming machines, type 50, made by Montreal Shoe Machinery Corporation of Montreal, Canada, for use in men's Goodyear welts, and the comment is:

"This customer now has a total of four of the above type machines installed and it has been reported that a fifth machine is in transit. This customer desires to purchase as many machines as possible, thereby saving unit charges."

The second one has to do with a welt beating machine, made by Montreal, not as yet installed, to perform the beating of welts. The comment is:

"If satisfactory, this machine is to replace our B & S machine"—is that right, "B & S"?—This was the eccentric roll-type. As the customer has not yet started it and we have not seen it in operation, we cannot describe the job done by this machine. Further reports will be submitted. Customer prefers to own equipment, thereby eliminating unit charges.

The third has to do with the lasting machine, [82] heel seat:

"Customer believes machine made in Germany to perform seat lasting."

The comment is:

"Mr. McDonald informs us he has on order a machine of this t[illegible] Delivery date uncertain. This machine is repo[illegible] to have been ordered on a trial basis and it is customer's belief that it is of German manufacture. Customer prefers to own equipment, thereby eliminating unit charges."

The next has to do with three press LaMac sole of LaMatie Process Company of Erie, Pennsylvania.

It is reported the sale price of these machines is approximately $400 each, used for sole laying:

"Three of these machines have now been installed and are in operation. Customer prefers to own machines, thereby eliminating unit charges."

And the last has to do with an outsole stitching machine, nameplate reads "Adrian-Busch Made in Germany, Frankfort," etc., installed by Blottner and McDonald of Hanover Shoe; reported sales price less than $2,000, to be used on outsole [83] stitching.

"Please refer to Rumor Report submitted under date of September 21. Customer prefers to own equipment, thereby eliminating unit charges."

"Facts pertaining to machine on reverse side," and that is a group of technical comments, at least they are technical to this poor lawyer.

I don't know whether I formally offered these in evidence. If I did not, I intended to.

The Court: I think you did. If not, they will be admitted.

(Exhibit P-22 for identification received in evidence.)

Mr. Hayes: I would also like to offer two what are known, I believe, as competitive information bulletins, also obtained on a search of United's records, one dated October 1, 1951, and one December 26, 1951, as one exhibit.

Mr. Carson: No objection.

The Court: Admitted.

(Marked P-23 for identification and received in evidence.)

[84] Mr. Hayes: The first of those is Bulletin No. 689, addressed to Mr. Wogan, with copies to various United personnel.

(Mr. Hayes reads from exhibit.)

Mr. Hayes: The second is Bulletin No. 701.

(Mr. Hayes reads from exhibit.)

*By Mr. Hayes:*

Q. Mr. Sheppard, I would like now to direct your attention to what have been called the optional machines made by United Shoe Machinery Corporation. I mean the machines that any customer could either lease from them or purchase from them.

Did Hanover purchase some optional machines from United? A. Yes, sir.

Q. And did it lease some optional machines from United? A. Yes, sir.

Q. Generally speaking, are the optional machines the ones that are the more complex or the less complex machines? A. Generally speaking, they are the less complex, simpler machines.

[85] Q. Now, in addition, did Hanover on occasion rent shoemaking machines from others than United? A. In a few instances, yes.

Q. And did it also on occasion purchase machines from others than United, other than machines—that is, the counterparts of——

Mr. Hayes: I will withdraw that. I have gotten all twisted.

Q. Still confining your attention to the so-called optional machines of United which could be available for purchase, did Hanover on occasion purchase from other

shoe manufacturers machines which were the counterparts of United's optional machines? A. I am sorry, I don't understand your question. You asked me if Hanover purchased from other shoe manufacturers?

Q. Machines they made. A. Shoe manufacturers don't make machines.

Q. Did I say "shoe manufacturers"? I am sorry, I meant shoe machinery manufacturers.

Did Hanover on occasion purchase from other shoe machinery manufacturers machines which were counterparts of optional machines made by United? A. Yes, we did.

[86] Q. Were those purchases bulk, large? A. No.

Q. Now let me direct your attention, if I may, to another subject having to do with shoe machinery, and that is the subject of service of the machines and availability of parts for machines. Will you explain to the Court, please, what, if any, importance attaches to the proper servicing of machines and to an adequate supply of parts for machines? A. Well, tremendous weight must be given to the availability of parts, and, of course, service in a little different way is equally important. But unless parts are available, you can't repair the machines. That's very evident. That was a consideration in the early importations of foreign machinery, the question of whether you could get parts and keep in parts, and so forth. That was always a consideration in purchasing the machine.

Now, how generally you want me to go into this—

Q. I wish you would. A.—I don't know, but up to a certain period the USMC furnished repair service through their requirement, and that was included in our royalty [87] and rental bill.

Q. You mean there was no extra charge for this? A. There was no extra charge, no, but it developed later that

the cost was included, and finally they made it optional where you could do your own repair work after the decision in the other case, and we immediately took advantage of that opportunity and set up our own repair service.

Q. That was in 1955, was it not? A. I think so. My dates are a little twisted, but I think so.

Now, as to the availability of parts from the United over a period of 40 years of my experience, the parts service was satisfactory. All of us, we have ups and downs, and there were a couple of occasions when parts were hard to get, particularly during distress years, there was squabbling about parts, but it was, by and large, over a period of about that time that parts were available. Of course, you were charged for all parts, you know.

Q. Yes. You paid extra for parts? A. Oh, yes.

As to the service, I believe I did say [88] that by and large the service, over my experience with the USMC, was good service, it was satisfactory service. I had my own pet peeves about some of it, but—

Q. Well, why don't you tell us what your pet peeves were? A. I said the service was good, and it was, by and large.

I always had an idea it was costing too much for the reason so many of their agents, although a good part of this time, or some of this time at least, they got to work about 9 and quit at 3, and if I knew it was in the bill I worried about it, and later I found it cost about X amount—

Q. I am sorry, I can't hear you.

Mr. Carson: Could we have the last sentence read?

(Answer read.)

A. When the offer came from the USMC to give us so much credit—I have forgotten the amount—

Q. You mean referring to the 13.3 per cent of the total rentals and royalties that were supposed to cover the service? [89] A. That was against the service. In other words, we do our own service and they give us a credit.

Q. And since 1955, when you were permitted to elect whether to do your own service or not, has Hanover done its own service? A. Yes, sir, we did it pretty promptly after we became aware of the credit.

Q. Now, what was the need for good service? What is the consequence of bad service or poor parts or unavailability of parts? A. Well, the unavailability of parts, of course, set down a machine as part of a continuous line of operation, depending on how many machines you have on a particular operation to do, say, 6,000 pairs a day, and if you have six machines on that particular operation, you take one-sixth of your production down, it jams up the whole factory and raises cain with you. If we don't have parts, we can't fix a machine. There were several parts to this question. You will have to—

Q. Keep on going. A. I ran out of parts of your question. What was the other part of your question?

[90] Q. Part was: what is the importance of service and parts and what are the consequences of poor service or lack of parts, those are the two parts of my question. There are two questions really. Let me start over again. A. You break your continuity of production and you can't get your machine fixed, you can't get a part. If you don't fix your machine right you are going to turn out bad work and then it has to stop, and the consequences are bad.

Q. During this period—I am sorry. A. I say the consequences are serious. These various questions you asked me—

Q. By serious consequences, are you referring to stoppage of production you mentioned before? A. Yes; or plus [*sic;* should be poor] work will not be accepted. That means damage to shoes until you catch up with it; and damaged shoes and stoppage of work and everything else, it is quite serious.

Q. There are two consequences mainly: one is stoppage of work and the other is poor production? A. Poor quality. Maybe this is a good time for a recess.

(Recess.)

• • • • •

they got it; and on occasion we bought parts when we got stuck for one reason or another.

Does that answer your question?

Q. I think it does, Mr. Sheppard.

Of the two kinds of machines that United had, those which were available only on lease and those which could be purchased, which had the greater need for a ready supply of parts? A. I would say the ones on lease did for the reason that practically all of the machines on lease were the larger, more important, more fundamental machines. That is the reason for that statement.

Q. Generally speaking, were the machines that could be purchased of a similar type? A. Yes, sir. Yes, sir.

Q. Now, earlier you testified, Mr. Sheppard, that on occasion Hanover rented machines from other shoe machinery manufacturers. A. We did, yes.

Mr. Hayes: I might mention that the questions I am now about to ask, the details will come out of Mr. Spear's testimony, but as long as Mr. [93] Sheppard is on the stand he can answer the parts I have now.

Q. Among those manufacturers was the Mitchell Company. I think it was John Mitchell heel builders. Do you recall renting machines from that company? A. Yes, we did. They were heel building machines and machines that had to do with heel building, such as lift grading machines and three or four machines.

Q. And you rented those machines from Mitchell, did you not? A. According to my best recollection, we did.

Q. So as far as you know, were those machines available for purchase from Mitchell? A. No, I don't think so. I am quite sure we inquired into that a couple of times.

Q. And at other times Louis Freeman machines were leased by the Hanover Company, were they not? A. That's correct.

Q. Now the same is true, is it not, of United Shoe machinery, which was available to customers for either lease or purchase, wasn't it? [145] A. Yes, you mean so-called optional machines?

Q. Yes. What counsel yesterday called the optional terms machine. You testified about that. A. Yes.

Q. Hanover sometimes leased them and sometimes purchased them, did it not? A. Yes, sir.

* * * * *

Q. Under the practice in connection with your form "A" leases you understood you were entitled to return the leased machines to the lessor when it suited your purpose

to do so? A. Yes, for many years for a charge, a return charge, which later worked into an accumulated credit system by United where it might or might not cost you a hundred or two hundred to return a machine, depending on the amount of credit you had built up in your reserve.

Q. I will ask one more question before the recess. Was that accumulated credit system you have referred to sometimes called the Right of Deduction Fund? A. Yes, I think that is the correct name of it.

Q. And you were given the opportunity, were you, on returning to United leased machines which for any reason you didn't want to use any more, the right to pay any return charges out of this Right of Deduction Fund? A. If we had—

Q. If you had a credit. A. On the credit side of the ledger, yes.

[155] Q. And your company always did have a credit, didn't it? A. Yes.

Q. Because of your extensive use of the leased machines, is that correct? A. That's correct.

* * * * *

Q. Without holding you to detail, Mr. Sheppard, I ask you whether it was your understanding that the Right of Deduction Fund was built up by United in 1939 to 1954 out of certain percentages of payments that your company and others made on their leases? A. You mean the general fund, not the fund?

Q. The Right of Deduction Fund which we described before the recess. A. I understood it was a specific fund credited to each company.

Q. Yes. Out of what money? [156] A. Out of earnings of royalties or royalties and rentals both, I don't know which, of returns from the shoe company to the USMC.

Q. And the earnings out of which— A. I mean the earnings of the machines.

Q. Yes, the earnings of the machines out of which this fund was created by United you understood to be payments which each company would make under its leases, is that right? A. Yes, a percentage of those.

• • • • •

[158] Q. Now it was out of payments made to your company in accordance with this kind of lease, D-6, with the terms which changed in accordance with the type of machine that the Right of Deduction Fund was built up, as I understand your testimony? A. Yes, that's correct.

• • • • •

Q. So you could by virtue of the Right of Deduction Fund return to United surplus machinery without charge whenever you wanted? A. Without charge provided you had a credit, of course, as we have talked about.

• • • • •

Q. So that under the practice as you remember it, your company had to pay for broken and missing parts, I might as well add transportation too on returned machines? A. I am not quite sure about the transportation.

Q. But subject to that—

A. Yes, I assume you paid the freight both ways.

Q. Subject to that, on the lease arrangement, you had a flexible arrangement whereby you could [161] return the machines either for another machine or a new model? A. Yes.

Q. And you did that to a considerable extent, did you not? A. Of course you did, you didn't keep machines around to pay on them that you didn't need, and when new models came along, you could return the old model within limitations and only be charged for this part matter that I spoke of.

Q. And you frequently did return an old model for a new model, didn't you? A. I don't know how frequently, but we did it many times, let me put it that way.

* * * * * *

Q. As I understand your answer you had the option to determine when you wished to return an old model for a new model, and within the limitations you described you did so to United Shoe under the leases? A. Yes, we did quite often.

* * * * * *

Q. This letter deals with a replacement of six assembling machines which had been received by Hanover in the year 1926 as to which the writer calls for new machines. Do you remember a discussion on that subject with Purtell? A. Not specifically, no, sir. I think that that—that Purtell was pursuing a policy, call it a policy, not in a serious way, of bettering his situation by using up more of his return fund credit.

Q. And he was in doing so getting the advantage [177] of equipping the factory with new machines in place of old machines under the leases? A. That would be the result of it, yes.

* * * * * *

Q. He had the right to do that under the leases and you approved of his doing it? A. I think he had talked about

it and decided it was a smart thing to do to take advantage of the fund that we had earned and accumulated in the credit to replace some of those old 1927 or '30 machines with new machinery.

Q. You considered this the smart thing to do? A. Why, of course it was. We had the credit and weren't using it. We had earned the credit, why shouldn't we use it?

* * * * * *

Q. Did any company make a complete line, so far as you knew, during 1939 to '55? A. A complete line adaptable to our standards and use.

Q. Let's say a complete line of shoe machinery. A. I couldn't answer that. I wasn't interested in any line except as applicable to our shoe.

Q. And by adaptable to your standards and use, what do you mean? A. What do I mean?

Q. What do you mean by it? What kind of machines do you designate as adaptable to your needs? A. Similar to the work performed by United machines.

Q. And you were, as I understand, making a search at some time in this period for machines of [204] that kind that you could purchase; it that right? A. Yes, sir.

Q. Did you know of any European company that made such machines? A. We knew of European companies that made this machine or that machine or some other machine, but not a complete line of machines that you could move into Hanover and produce Hanover shoes. There never was any such line in existence anywhere, to the best of my knowledge, and our investigations substantiated it.

Q. Your answer is that you did not know any company other than United which made a complete line of machines adapted to your company's use; is that it? A. Or even a fairly complete line, yes.

Q. Weren't you interested in purchasing individual machines, if not a complete line? A. Yes, and we did.

Q. What companies made individual machines, other than United in this period, whose names you are familiar with? A. Well, a great many companies: Adrian & Busch, Albeko, Montreal, Pedersen, Standard, and [205] others that I can't recall at the moment. I'd probably be familiar with them—

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[208] Q. Wasn't the Jupiter stitcher manufactured by Pederson or Peterson? A. Pedersen.

Q. Did you try that? A. Yes, sir.

Q. Did you keep it or reject it? A. We rejected it at that time. Since then—and quite recently—they have revised, revamped the machine, rebuilt the machine. We have one, and bought it, and it is very satisfactory. It is the first one that has done competent, comparable stitching to the Goodyear stitcher.

[209] Q. When was it you first tried the Pedersen stitcher, can you remember, the Jupiter stitcher? A. No, I can't. It was probably 10, 12 years ago.

Q. Did you know it was in use in this country at that time by other shoe manufacturers? A. That's what caused us to try it.

* * * * *

[210] Q. You don't know of any, as you sit here, that were using it when you first tried it; is that so? A. Trying it or using it, please?

Q. That were using it when you first tried it, 10 years ago. A. There were a couple that were trying it. What the result was of the trials, I do not know. I think Freeman was trying it, perhaps, and perhaps Weinbrenner. I don't know with any certainty who they were.

Q. With that date and prior to 1955, did you know of any factories who were actually using the Pedersen stitcher? A. You mean during the period from 1955 to now?

Q. Now, after the date of the first trial by you of the Jupiter stitcher and prior to 1955, did you learn the names of any American factories which were using that machine? A. No, I don't think so. Of course, we had the machine in our plant, we gave it a good trial and rejected it, so anybody else who was using it [211] it would be their business and not ours. I don't recall the names, though.

Q. You rejected it because you considered it was not as good as the United Goodyear outsole rapid lock stitch? A. We were quite sure it was not as good, or we would not have rejected it.

Q. You preferred the United machine? A. Yes.

Q. And you preferred to lease the United machines on the form A rather than purchase them? A. We had no choice if we preferred to lease them.

Q. When you decided to use it you knew you could only lease it? A. Yes, sir.

Q. And you preferred to do it on those terms rather than to purchase the Pedersen machine? A. Rather than to purchase any unsatisfactory machine. We tried several stitchers, several makes of stitcher, and they were all unsatisfactory for our purposes. We have bought since the

last year or so a Jupiter machine which is satisfactory, but we only heard about it, the new Jupiter, within the [212] past year or two.

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Q. And you recollect having been informed that in 1949 Mr. Boyd's company established a plant in Jerusalem for the manufacture of men's welt shoes? A. Yes. The whole industry was aware of that.

Q. The whole industry knew that, didn't they? A. Yes.

Q. From what sources did they get it? A. I don't know what sources.

Mr. Carson: I withdraw that.

A. It was fairly widely advertised.

Q. Did you know that factory was equipped exclusively with machinery that could be purchased, either United machinery or foreign machinery adapted to the manufacture of men's welts and of women's welts?

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[218] A. I don't recall knowing it. I did not mean to be irresponsive in my answer. It would have been of no interest to me if it had, for good reasons.

Q. You say if you had known that it would have been of no interest to you? A. That's right.

Q. Your company, I take it, subscribes to the periodical known as Leather and Shoes? A. Yes, yes.

Q. I show you an article reprinted from that magazine, January 3, 1953, issue, entitled "Shoemaking Miracle in Jerusalem," by Claude M. Swinney, General Shoe Corporation, and ask you if you ever [219] saw it before. A. No, I don't think I have.

Q. Did no one in your organization call this to your attention? A. If they have, I have forgotten it. Of course, this is what Mr. Swinney says.

* * * * *

In addition, did you not receive from United planning service without charge? A. There was a planning service available without charge.

Q. Sir? I am sorry. A. I said there was a planning service; there was a planning service available without charge. At times we discussed planning with them, took some advantage of it from time to time over the years.

Q. And from time to time—the dates I won't bother you with—Hanover Company, to your knowledge, did utilize, without charge, that planning service of United? A. Yes.

* * * * *

Q. Now, just before receipt of that announcement, or a month before the receipt of that announcement dated July 31st, is it a fact that you had a conference at Hanover with my partner, Mr. Kiendl, and Mr. L. B. Walker on or about June 28, 1950, concerning the pending government case? A. Mr. Walker and Mr. Kiendl called on me informally, though I think Mr. Walker called me from somewhere in the vicinity and wanted to know if I would be in and I said yes. He asked if they [251] could come to see me and I said yes. I don't know if I understood what they wanted to talk about.

When they come in it was not unusual for officials of the USMC to call on me when they were in the vicinity or the area, and I did meet with them.

* * * * *

[252] Q. You do recollect that they told you they were interviewing witnesses or possible witnesses in the case? A. Yes, sir.

Q. And you understood, did you not, that you were one of those possible witnesses? A. Well, naturally, if they were looking around for witnesses and saw fit to take their time out to come see me, I would naturally think that perhaps I might possibly be asked to act as a witness.

* * * * *

Q. Can you remember anything that was said in that interview? A. The reporting of the interview is so—I don't know what. It is just—it touches, and only touches, on a few things that sound right to me.

Q. Just tell us what you remember. A. I think that we—probably I did—discussed in the form of a gripe or complaint, if you will pardon the word—I think I touched on the fly-by-night outfits that the USMC set up in business which only cause chaos and confusion in the area, but that's been a pet peeve of mine for a long time.

I remember that I probably said that we could not make shoes without United, and the important thing in manufacturing is the continuity of operation.

* * * * * *

I touched on the old Colonel King incident, where I was young and brazen enough to refuse to sign certain leases connected with clicking machines.

Q. Now, what was your incident with Colonel King about the leases on clicking machines? A. About 1921, or early 1922, United came out with some new form of lease in connection with clicking machines, and in there was a clause which required us to acknowledge that the USMC

owned the dies, which are very expensive—that's a cutting die—even in [258] spite of the fact that we bought the dies, paid for the dies, and this clause was in the lease requiring us to acknowledge they were their dies and could not use them on other machines, and a lot of other foolish things, and I was, as I said, young enough, perhaps stupid enough, to refuse to sign them.

Q. To refuse to what? A. Refuse to execute them.

* * * * *

Q. All right. A. And shortly after that there was a change made and that clause was stricken from the lease. In the meantime I had bought 11 Reece machines, which I mentioned in my testimony before, and that's about the story.

Q. And you told Mr. Kiendl and Mr. Walker this in the interview? A. Yes.

Q. Or something about it? A. Yes; but this was a very garbled report on the part of Mr. Ward.

Q. I take it you told them at length about the Colonel King incident? A. I did.

Q. What else do you remember about the inter- [259] view? You don't have to confine yourself to the memorandum. A. I am looking for the subject matter. I can't remember everything that was covered.

I expressed at that time a general dislike for some of the antitrust suits that had been brought in the past by the Department of Justice and I took a rather dim view of some of them. Again that was before your case was tried; in a manner of speaking, quite a long time ago. This was 12 years ago. I hadn't been too long out of Washington

at that time and was a little sour on some departments of overzealous bureaucracy that took place during the war.

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Q. Now, you had testified that the corporation had a policy of purchasing machines. A. That's correct.

Q. Tell us what Purtell and Cadwell said as to the advantages of carrying certain machines on lease. A. They pointed out more fully than this report shows that it would be not only advantageous for us to purchase some machines almost immediately, which was done, some $550,000 worth, and that we did not purchase in 1955 some $90,000 or $100,000 worth of machines for one reason or another, either we had hopes of some machines other than United developing, that were under test by us, into machines—we weren't through testing on that. There were a couple of instances we did not buy them in their first year because of fear of obsolescence. There [288] was this matter of form B lease facing us, which upped the rentals a great deal, and some of the machines that we refer to here we thought were perhaps not too good a buy.

But the fact remains that within 12 months we did buy them all; and I am sure that is what Purtell and Cadwell meant in this survey: while they urged purchase, they did not urge purchase of all of them.

Q. I have directed your attention to the language in your own company's minutes which says they pointed out it would be advantageous to continue to carry certain machines under lease, and I asked you what they said. Have you told us all you can remember of what they said? A. I have.

Q. You kept telling us what they said in 1956. They didn't say that in 1955. A. No, I didn't.

Mr. Hayes: That is not a correct characterization.

Mr. Carson: I think it is.

Q. Do you remember anything more as to what they said was the reason it would be advantageous to [289] carry machines on lease? A. They didn't say to carry machines on lease, period. They went into detail—not in this meeting—but into detail as to what machines and why.

Q. And you have told us all you can remember of their reasons? A. I told you all I can remember.

Q. They said that the survey showed it would be advantageous to return a number of machines to United and in their stead purchase outright machines offered by other suppliers? A. Yes.

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[318] • • • Q. Now my question, apart from dates, is merely whether you recollect that at the period, whatever it was, Mr. McAllister was advising the Technical Committee on the negotiations with United Shoe concerning the sale prices of outstanding used machinery. A. Yes, sir.

Q. It was, wasn't it? A. Yes, sir.

Q. You had different meetings with him on that subject? A. Yes, sir.

Mr. Hayes: I am sorry. May I have the last question and answer.

(Question and answer read.)

Mr. Carson: I ask for a concession that the document shown the witness entitled "Sales prices for

[319] outstanding shoe machinery, May 7, 1955, prepared by Andrews, Anthony & McLean was filed in May, 1955, in the Government action in the District of Massachusetts, Civil Action No. 7198."

Mr. Hayes: I don't know about it offhand.

It is my present information from Mr. Morten who was in the negotiation with Mr. McAllister that this copy, which I assume is the right one, was filed in the proceedings having to do with the negotiations leading to the termination of the existing leases. I think that was the proceeding, was it not?

Mr. Carson: That was the proceedings. I will take that concession and it may be subject to correction.

I offer in evidence the document just shown the witness and just identified as being a report, as previously described, of 72 pages with five annexes, six annexes.

Now, the document is an entirety and I think it is fair to offer it as an entirety but if there is objection to the bulk, I will limit the offer.

Mr. Hayes: If your Honor please, I object to this document going in evidence as any proof of the truth of its contents. I have no doubt—I [320] know that Mr. Sheppard saw—I believe it is the preliminary transcript or manuscript which led to this Exhibit D-34 for identification. I know that on his pretrial examination he was examined about it and expressed disagreement with certain portions of it. This is in the nature—and I have never had an opportunity myself to read it in detail—of the opinion of an economist.

This is no way, I submit to your Honor, to prove economic testimony. I have no doubt that it was or it is even in final form—certainly in its draft form it was in the hands of the plaintiff in this action. I have no objection to it going in as a document which came to the attention of the plaintiff. I object to it for any other purpose.

The Court: All right, Mr. Carson, what is the reason for it?

Mr. Carson: The purpose is first to establish it as a document which came to the attention of the plaintiff through its president as a member of the Technical Committee in 1955, second to show that the Technical Committee, with the plaintiff's knowledge, espoused the contentions in this document in [321] the negotiations with the defendant, and third, to show that as a result of its espousing these contentions, a document emerged as part of the plan for terminating Form A leases with a discount table of which this plaintiff is taking advantage in this action.

Now I am willing that it should not be received for the truth of its contents. I admit that the contents are subject to cross-examination.

Mr. Hayes: If your Honor please, the second point that Mr. Carson mentioned was that—what was that language you used?

Mr. Carson: It can be read.

(The following was read:

"Second, to show that the Technical Committee, with the plaintiff's knowledge, espoused the conten-

tions in this document in the negotiations with the defendant.")

Mr. Hayes: There is no evidence before your Honor that the Technical Committee did engage in such espousal. This is merely the report filed in court on behalf of the National Shoe Manufacturers Association and individual members of the Technical Committee may have had all sorts of varying reactions [322] to the contentions advanced by Mr. Anthony and there is no proof to the contrary, and as Mr. Carson knows, Mr. Sheppard on deposition testified flatly that he disagreed with some of the contentions, at least and specifically the cost of capital, one which was advanced by Mr. Anthony in Plaintiff's Exhibit D-34 for identification.

The Court: Mr. Carson, is there anything in there to show that the Technical Committee did espouse this report?

Mr. Carson: Yes, the offering letter, April 27, 1955, states that the report embodied the factors that the committee authorized for use as a basis for negotiations with United on the prices of outstanding machines.

Mr. Hayes: That does not say they espoused it.

Mr. Carson: I am treating that as an espousal.

Mr. Hayes: I don't think the language says that, Mr. Carson.

Mr. Carson: It states:

"Copies of the report will be handed to United's counsel today. The points of law [323] in the report . . . are statements of the views of counsel

for National Shoe Manufacturers Association" who happen to be counsel for Hanover today.

The Court: All right, we will admit it. You will be protected, Mr. Hayes, on the record.

Mr. Hayes: You mean it is admitted for all purposes?

The Court: Not for the truth of the contents. He said he does not want it for that.

Mr. Hayes: How about the opinions that are in here?

Mr. Carson: I am not stating the opinions as evidence in the case, but I am stating the opinions and their bearing on the negotiations and on the terms exacted from this defendant as a factor in the issues between Hanover and United.

The Court: As I understand it, it is not the truth of the contents, but it refers to the facts that you stated in your first three reasons, or in your three reasons you stated certain facts.

Mr. Carson: Yes.

The Court: Not the truth of the report.

Mr. Hayes: And as I understand, not the [324] validity of any of the opinions.

* * * * *

[387] * * * Q. With reference to the United lease only machines, take the years 1940 or 1950 as examples, isn't it a fact that you could not make a business decision whether to lease, continue leasing those machines, or to purchase those machines if available for purchase until you knew what the price of those machines was as fixed by either United or by some Court? That is obviously

true, isn't it? A. I don't know that it is so obviously true, sir, because you had some optional machines which we declined to buy because we, in our opinion, thought they were priced too high.

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Q. [389] • • • Isn't it the fact that in all the years that you knew the management of United Shoe, whose names you gave us yesterday, you never once asked any one of them gentlemen for the right to buy any of the machines that were on lease terms only? A. I don't know whether anyone ever asked them or not. I don't think I ever did.

Q. You never did. And you were the president since 1940, weren't you? A. That's right. It would have been sort of a foolish question, wouldn't it?

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As you sit there, as chairman of the company, wouldn't you admit yours was one of the most prosperous, if not the most prosperous? [391] A. Not quite. It was among the most prosperous.

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". . . Q. Can you say whether or not your company, before 1955, purchased from United Shoe all of its machines available on optional terms for purchase or lease? A. Yes. I can—" then there is an interruption.

[2316] "Q. Which were adapted to the operations of your company? A. Yes. I can say we did not.

"Q. You did not? A. No.

"Q. Now, am I correct in my recollection that you previously testified that your desire and your purpose was to buy all the machines that you could rather than lease

them? A. Yes; you are correct as a general statement.

"Q. Can you state any reason why in those circumstances you did not purchase all the machines available to you on optional terms? A. There I think you'll have to be more specific as to what machines you're talking about, Mr. Carson. There are different reasons why we did not buy certain machines.

"Q. Can you state any of the reasons? A. Yes. They're priced too high; it would take too long to pay for them based on the rental and royalty—rental, not royalty, that was being charged for them; they were low-cost machines and would perhaps take ten years to pay for in some cases, and in some instances there were either rumors of or actually had later models [2317] come out to supersede the models that were offered. So—

> "Mr. McAllister: To clarify that answer, when, Mr. Sheppard, you referred to them as low-cost machines, what did you mean?
>
> "The Deponent: Low cost as to rental.

*"By Mr. Carson:*

"Q. That is, the rentals seemed to you low as compared with the sales price? A. That's right. I think we could have bought some edge trimmers for a good many years, but when I first became aware of that privilege, a new edge trimmer had taken its place, which was superior to the old one."

* * * * *

[2320] "Q. What you have there, Mr. Sheppard, is a list which I am informed by the defendant could have been bought during this period, and I am only asking you to

determine, tell us which of those you knew about as being available. Now, have you finished your answer? A. Yes. I have about finished it. I am afraid it isn't satisfactory, but I can only answer your question this way, that I knew there were ten or a dozen machines, types of machines, different types of machines, that could have been bought, and that over a period of years I have examined one or more of them a number of times, and we decided not to buy them for the reason I have previously stated."

* * * * *

[2326] "Q. Were you aware before 1955 of any American shoe manufacturers who operated exclusively on foreign-made machines?

"Mr. McAllister: Now, what kind of a machine?

A. I can answer that question if you will frame it just a little different.

"Q. How should I frame it? A. Were operated exclusively with machines other than United machines.

"Q. Well, I was directing myself to machines of foreign manufacturers. Let me mention the Williams Shoe Company in Portsmouth. A. Well, that is what I had in mind, exactly.

"Q. Now, what was the fact about them? A. Well, I don't know. I was never in their plant, but I understood that they were operating without a single United machine in the plant, and that is why I asked you to reframe your question."

* * * * *

[2331] "Q. Since 1922 you say you have been interested in buying shoe machinery? A. Yes, sir.

"Q. As far as you could? A. Well, I didn't answer yes to that one, your addition to the question, as far as we could do it advantageously and worth while.

"Q. In other words, you didn't have a policy of buying any and all shoe machinery but only such as you could buy advantageously? A. That is right, with one minor exception. I didn't bear down or insist too much on some of the little inconsequential 'pinky-doodle' machines that bore a very small relationship to our royalties and rentals total."

Mr. Carson: Page 40, second question from the bottom. There had been previously a discussion of tie-in clauses in the Twenties which are dealt with in earlier litigation.

"Q. I want to be sure your testimony is clear. Apart from what you call the tie-in clauses, do I correctly understand that it was your wish and policy to purchase all important machines that you could purchase advantageously, is that correct? [2332] A. That is correct.

"Q. What did you mean by saying 'purchase advantageously'? How did you determine what was advantageous? A. Well, first you determine the quality of the machine, the quality of work the machine produced and the ease of operation and the lack of trouble with the machine. Then you looked at it from the economic standpoint, and if you could get a good return on your investment, it was another criterion as compared to the lease rental contract.

"Q. Were those the only factors that you took into account in deciding what would be an advantageous purchase? A. I don't know what other factor there would be to consider.

"Q. Now, as far as the first one of quality is concerned, that would apply on the question whether you would lease a machine also, wouldn't it? That is, you wouldn't want to either lease or buy a machine that didn't give you the quality you wanted? A. No, that is correct.

"Q. So really the determinative factor in deciding whether or not it was advantageous to buy your important shoe machinery was the second one, wasn't it, [2333] getting a good return as compared with the lease charges? A. That was one of them. Another one was in sturdiness of the machine as to whether you were buying a constant repair bill on it for parts and other things. And another one was the ease of operation on the operator himself.

"Q. Well, ease of operation would apply equally to whether you lease it or buy it, wouldn't it? A. Well, yes, it would.

"Q. So I am just trying to isolate the factors, Mr. Sheppard, which determined in your mind that a purchase was advantageous. As I understand, it is a matter of the good return and the sturdiness of the machine. Are those the factors? A. Well, they are most of them, I think.

"Q. Can you think of any others now that you applied in deciding whether you wished to purchase a machine in the past? A. Not offhand I can't. There was a certain fear for a period of time in purchasing a machine—it was rumored—I suppose it happened at least once or twice—that you might be buying a lawsuit from United in those earlier years.

[2334] "Q. That is, patent infringement? A. Yes, sir.

"Q. Did you give consideration to the danger of obsolescence of a given machine type in deciding whether the purchase was advantageous? A. Yes, we certainly did.

We did that in the purchase of U. S. M. C. machines, found out in one instance that we were very well justified in doing it.

"Q. Which instance was that? A. In the instance of the edge trimmers.

"Q. When did that occur? A. Well, it started way back, some time probably in the Twenties. We owned all of our edge trimmers at one time, Model F, and then we started to buy some Model H's, and it was a superior machine to the Model F. We also continued to lease the Model H's, and then about the time Model L came out, and it is my recollection we quit buying the H's, which was an improved machine doing the same work.

"Q. Was the Model L better than Model H for your purposes? A. United said it was better.

Q. What did you think? A. It was a more modern machine, had some improve- [2335] ments in it. But the fear of obsolescence always entered into our consideration of purchasing any machine, whether it be from United or from somebody else, in an expensive machine.

"Q. All these considerations applied to purchase from all sources, not only United, didn't they? A. Certainly.

"Q. So now do we have four factors which determine the advantageousness of purchase in your mind, namely, the good return as against the cost of leasing, the sturdiness of the machine, the possibility of a patent infringement suit in a few cases, and finally the fear of obsolescence? A. They were the major ones.

* * * * *

[2338] "Q. So from your present point of view you would say that a number of machines were leased by your company from various suppliers which in accordance with

your policy should have been purchased. Is that what [2339] you are saying? A. No, I did not say that.

"Q. Well, did I misunderstand you? A. No, I don't think so. There are other reasons. In some instances the machine wasn't worth purchasing. The gain to be had from owning the machine was not worth purchasing. In other instances, in many instances, there was fear of obsolescence where we had heard about a better machine coming out, either being put out by United or somebody else, and the amount involved was not worth a great deal of discussion, a great of thought. We waited to see.

"In some machines the improved machine came out either by United or a competitive manufacturer, and in some instances it never did come out.

"Q. Well, those instances you have described are instances where it would be your own policy and program to lease rather than to buy the machine for the reasons you have stated, aren't they? A. I don't think so, unless you are talking about an individual machine. There is no use to buy a machine that you feel is going to be obsolete in a year or two.

"Q. Haven't you already said that where there [2340] was fear of obsolescence your policy was to— A. To postpone—

"Q. —was to lease the machine and not buy it? A. To postpone the purchase.

"Q. So that where your superintendents did that, it was in accordance with your policy? A. That is right.

"Q. Was any program or policy of your company with respect to the mode of acquiring shoe machinery ever stated in writing? A. No, not to my knowledge, I don't think so.

"Q. How is the policy or program that you have been describing manifested? A. Word of mouth. We had very, very few intercompany memoranda."

Mr. Carson: Page 55, first question:

"Q. Now, in your answer previously as to the way you would determine the advantageousness of purchasing you referred to the existence of a good return on the purchased machines as compared with the leased terms— A. Comparative, yes.

"Q. How would you determine and decide that there was a good return? [2341] A. Took the figures and looked at them.

"Q. What standards or formula did you use? A. No formula.

"Q. What items of cost did you take into account? A. The cost of the machine that we were considering purchasing, the royalties and rentals on the machine we intended to replace with that machine, and this can't be called a formula but approximately how long it would take to pay, for the competitive machine to pay for itself, or the United machine on purchase to pay for itself. If it looked pretty good, we bought it. If it didn't we didn't.

"Q. What term of years did you use to determine whether the accumulated rentals and royalties looked pretty good in comparison with the sale price?"

Mr. Carson: Off the record.

(Discussion off the record.)

Mr. Carson: Then the answer was: "I didn't get the last two or three words."

The question was reread.

"A. What term of years did we take?"

Mr. Hayes: That is the answer.

Mr. Carson: Yes, "A. What term of years did we take?"

[2342] *"By Mr. Carson:*

"Q. Yes. A. We didn't have an exact measuring stick but if it looked like a machine would pay for itself, say, in five years as compared to the royalties and rentals or rental that we were then paying, we would buy it probably unless—and I wish to make this point clear—if the competitive machine was inferior to the United machine, and inferior machine either in construction or ease of operation or the work, the actual work it did on the shoe itself, we wouldn't buy it, regardless of cost.

"Now, in the case of buying or leasing a United machine, there fear of obsolescence or rumor of a new machine either by United or some outside producer, we would hold off, sometimes hold off quite a while.

"I was amused in one of the exhibits you showed me where back in 1950 on our tour through Beverly they were then planning on standardizing heel seats and made a good deal of progress, which then would influence a lot of machinery, particularly in the lasting room, like the heel seat laster and other machines. Now, that has not materialized as yet as far as I know, and it has been ten years.

[2343] "That alone would retard one from buying a machine similar to the United machine if more automation was in sight, and we were told that it was in sight. But that was ten years, eleven years ago, and it has not arrived. I don't say this in a critical way; I simply say this from an investment standpoint in purchase.

"There were other minor things that have been talked about. You know there are not very many secrets in the shoe trade between the manufacturers and the branch managers or the district offices. While it might not be absolutely accurate as to timing, and so forth, there are a good many tipoffs, food for thought, or rumor, or what have you that you are aware at the moment."

• • • • •

"In 1956, to the best of my recollection, we cleaned them all up, all of these questionable machines, I mean in our own minds, and bought them, and I have just forgotten what that purchase amounted to, but I don't think it was—I am only guessing—around $75,000.

"What was it, Paul (addressing Mr. Spears)? [2388] May he tell me? I think he knows."

Mr. Spears said $93,000 in June 1956.

"The Witness: $93,000 in the aggregate."

• • • • •

[2396] Mr. Carson: Page 38:

"Q. Did Hanover purchase all the machinery adaptable to your process that it could purchase prior to 1955? A. I wouldn't say they did, no.

"Q. Why not? A. Well, there may not have been any advantage in purchase for one thing.

"The majority of the machines that we have been talking about, again I say, were inconsequential machines more or less, not the fundamental machines. But we may not have liked the machine. There are a number of reasons. The same applies to not purchasing some of your machines that were offered on an optional basis.

"In many instances there was not much financial advantage or savings to the company in buying that small type of machine as long as you couldn't buy the major machines. Occasionally some little machine would come along that would attract you and if you liked it, you bought it. But there were no lines in those days of shoe machinery in this country. The lines didn't become available until after the court decision or just prior to it."

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[502] *By Mr. Hayes:*

Q. Mr. Spears, do you have records and can you tell us how many of the lease only machines of the 20 major types which were in the Hanover factory in 1955 prior to the time of purchase were later returned to United without any replacement being made? A. I have some work papers that I could read.

Q. All right, will you get them.

(Witness produces documents.)

A. Prior to the time of the purchasing of this shoe machinery by Hanover in 1955, there were 154 machines included in the 20-machine type group. Hanover, between 1955 and 1961 purchased 133 of these machines included in the 20-machine type group and we returned [503] 20 machines that were included in the 20-machine type group.

Q. And you returned 20—and I missed what you said after that. A. We returned 20 machines that were included in the 20-machine type group.

• • • • •

[517] Q. Now from your records will you tell us what happened with respect to the—whatever the number was—of United machines which were in the Hanover factory prior to the 1955 records? A. Yes, sir. May I get my papers?

Q. Oh, certainly. Sure.

(Witness produces documents.)

A. There were 306 machines in the factory—

Q. Pardon me, just a second. Do you need this? A. Yes, I would need that. There were 306 machines in the factory.

Mr. Carson: When?

The Witness: Prior to the purchase, Mr. Carson, and I believe they were listed on PS-4, I believe, during my deposition.

Q. That was part of Defendant's Exhibit 33 for [518] identification. A. Thank you. Out of those 306 machines, the Hanover Shoe purchased from 1955 up to the present time 266 of those machines. They returned 39 of them and there is still one machine remaining on lease from United.

Q. Is that the outsole rapid lockstitch that Mr. Sheppard mentioned yesterday in his testimony? A. Yes, sir, that is a spare machine, as I understand it.

Q. Now, can you tell us by dates or by years, or generally, when the purchases were made, what years or anything that you did make? A. Well, there were two major purchases. In 1955 there was one large purchase made in October when the company purchased 205 machines,

and there was another large purchase made in June of 1956 when there were 47 machines purchased.

Q. Were there any machines purchased between 1955, September, October, or whatever it was, and June of '56? A. Yes, sir, there were some small purchases, just stragglers.

Q. And what was the total that had been purchased by June of 1956? [519] A. There were 211 machines purchased from the large purchase in June of '56.

Q. 211, and how many do you say there were purchased in June? A. In June of '56, another 47.

Q. That would be 258 were purchased by June of '56? A. Yes, sir.

Q. Were there any United machines purchased after June, '56? A. Yes, sir.

Q. How many? A. Eight.

Q. Could you tell us the years in which they were purchased? A. There were three purchased on August 4, 1956, there was one purchased on September 10th of 1956, another one purchased in October of '56, another one purchased in November of '56, and there were two more machines purchased in 1960, one of them in October and one of them in August.

Q. So of the total number of machines purchased, all but two were purchased by the end of 1956; is that correct? [520] Yes, sir.

Q. And the other two were purchased you say in 1960? A. Yes, sir.

Q. Now, of the machines returned, how many were returned? A. There were 39 returned.

Q. I am sorry? A. 39 machines were returned.

Q. And when were they returned? A. There was one returned in July of 1955 that was on that list. There were another 19 machines returned on September 10, 1955. There were five more machines returned on October 29, 1955, there were 10 machines returned on February 1, 1956, there was another machine returned on May 15, 1956, and three more machines were returned in 1960, one in March, one in June and one in August.

Q. Those are the total returns? A. Yes, sir.

Q. And just the one machine that was on lease during the period, Form B lease? A. Yes, there is one machine on lease at the end of the period.

[521] Q. That was the machine you received in 1954, if I remember rightly, is that correct? A. I believe it was shipped toward the end of 1954, yes, sir.

• • • • •

Q. Now as to the 3 machines returned in 1960 at different dates, do I correctly understand that they had been held by your company just before the return of each on Form A leases?

Mr. Hayes: Could I have that question again? (Question read.)

[522] Q. Is that right, Mr. Spears? A. You are saying they are asking me whether or not they had been held on Form A leases?

Q. Whether they were on Form A leases at or just before their return. A. Oh, they had been on Form A leases.

Q. So the fact is then that until these different dates in 1960, your company continued to retain the three machines on these old Form A leases? A. I believe that—

Q. To pay rentals, or whatever it was? There are three machines, did I say two? These three machines, on the old Form A leases, and to pay the stipulated rentals or royalties as called for by the leases? A. Yes, sir, I believe that's right.

Q. And I take it the same would be true with respect to those which you testified were returned at different dates from July, 1955, to May, 1956, when returned and just before they had been on Form A leases? A. Yes, sir, that's right.

Q. Certain of the machines which were considered for purchase in 1955 were converted to Form B leases by the company, were they not, without going into the numbers? [523] A. I believe so, yes, sir.

Q. And the Form B lease it has been said here generally carried somewhat higher rates and somewhat different provisions? A. Yes, sir.

* * * * *

[1208] CHESTER WARD, called as a witness on behalf of the defendant, being duly sworn, testifies as follows:

*Direct Examination by Mr. Carson:*

Q. What is your residence, Mr. Ward, please? A. Spartanburg, South Carolina.

Q. You are a member of the South Carolina bar, are you? A. Yes, sir.

Q. Are you a member of any other bars or courts? A. I am a member of the New York bar and of the Federal District Court, Southern District of New York, United States Supreme Court, the Western District of South Carolina and the Fourth Circuit Court of Appeals.

Q. Were you at any time associated with my firm, Davis Polk Wardwell Sunderland & Kiendl? A. Yes, sir, I was from November 17, 1947 to I think approximately September, 1950.

[1209] Q. Did you at that time attend at an interview with the president of Hanover Shoe, the Hanover Shoe, Inc., namely, Mr. Lawrence Sheppard? A. I did, sir.

Q. Where did that occur? A. It occurred in Hanover, Pennsylvania.

Q. And at what place in Hanover? A. At the office of Mr. Sheppard.

Q. Were Mr. Sheppard and you present? A. Yes.

Q. Who else was present? A. Mr. Kiendl of Davis, Polk and Mr. Walker, and possibly another gentleman, I am not sure about that. I know that those people were present.

Q. How long was the conversation? A. I would say about an hour and a half.

Q. Can you just tell the Court without giving us the substance of conversations with anybody else how it came about that this interview occurred; what was your objective? A. Well, Mr. Kiendl and I, and Mr. Walker, made a trip through New York, Pennsylvania and Maryland to interview approximately twelve top executives of various shoe companies, the purpose of which was [1210] to ascertain whether or not these individuals would be willing to testify for United Shoe Machinery Corporation in a then pending antitrust suit brought by the United States Government and, of course, to determine whether or not it would be to our advantage to have these people testify, providing they were willing to do so.

Q. And Mr. Sheppard was one of the persons so interviewed? A. He was.

Q. Now, during the conversation did you take notes? A. I did.

Q. Tell us in what form, in what way you took notes. I am directing myself as to whether other people could see you or whether this was done so that they couldn't see. A. Well, I had a yellow pad comparable to the gentleman sitting over there, typical legal pad.

Q. This kind of 8 by 11 legal pad? A. Yes. And I had it on my knee, and I took notes comparable to the gentleman there taking notes, and anyone that had normal vision could certainly see me do it. No effort in any way to hide it.

[1211] Q. After the conversation was over, what did you do with your notes? A. I put them in my briefcase, and didn't look at them again until I got back to New York.

Q. After that did you change them to any other form? A. Yes, I then, as I had done in all the other interviews, wrote memoranda of the interviews and submitted them to Mr. Kiendl, who was my superior.

Q. And you submitted such a memorandum of the separate interview, did you? A. I did.

Q. I show you D-25 for identification. Is that the memorandum? A. Yes.

Q. You see it bears on the first page the date June 28th. Was that the date of the interview? A. Yes, sir.

Q. What year? A. 1950.

Q. Now, first let me ask you as to the scope of your memorandum which I note is four pages. Did you purport to set down everything that was said? No, sir.

[1212] Q. In what way did you attempt to represent the conversation in your memorandum? A. Well, I tried to take down everything that was said that was pertinent to our inquiry. Obviously if a conversation goes for an hour, hour and a half, a lot of it can be repetitious, extraneous to the point at hand and have no particular significance to what we were trying to do, so if we got into one of those lapses in conversation that had no bearing on what we were after, I would, of course, not bother to copy that down.

I only took down the things that had reference to what we were there for.

Q. Did you put down in your memorandum everything that you thought was pertinent concerning what Mr. Sheppard would say as between the parties in the Government case? A. Yes.

Q. When you made your memorandum, did you attempt to make it as accurate as you could? A. Absolutely.

Q. Is it or is not, according to your recollection, an accurate statement of the conversation in Mr. Sheppard's office? [1213] A. Yes, sir, it is accurate.

Q. There has been some testimony in this case that Hanover Shoe had a policy of purchasing shoe machinery. Was anything said in the conversation by Mr. Sheppard to that effect? A. The only time that I can remember the question of leasing against purchasing coming up was in regard to the Colonel King incident, and I think as I state over here—

Q. Are you referring to the bottom of page 3 of the memorandum? A. Is that where it is? Yes. Mr. King—I mean Mr. Sheppard made it very clear to us that he was his own boss, and that he had established that policy when

he was quite young in so far as United Shoe is concerned, and that after he had more or less got that settled that therefore he was a free agent, so to speak, to purchase or lease as he saw fit. He had been the man to call the shots.

Q. Was anything else said that you can now remember by Mr. Sheppard concerning the Form A leases of the United Shoe or the leasing policy of United Shoe other than what appeared in your memorandum? [1214] A. Nothing other than what appears here, Mr. Carson. This again was intended to be a summation for our purposes to reflect his attitude as to whether or not we would call him as a witness if we needed him, and it is very clear in my mind, I remember the conversation very vividly, that Mr. Sheppard was very pro United Shoe, and the only thing about the leases which he didn't like was the fact, as I said there, it allowed what he called every fly by night person to get into the business and he objected to the fact that it allowed competition to hurt him.

It wasn't that he objected because he had the lease; he objected because United let others have machinery.

Q. Now, Mr. Ward, you appreciate I am trying to call for the substance of what was said. Are you repeating the substance as nearly as you can of what he said on that subject? A. Yes, I am. Yes, I am.

Q. I previously directed your attention to whether or not anything was said by Mr. Sheppard to the effect that his company had a policy of purchasing shoe machinery so far as it could. Was anything [1215] said? A. I have to refresh my memory on that.

Mr. Hayes: Will the record show that the witness is referring to—what exhibit is it?

Mr. Carson: D-25 for identification.

A. The only thing I can say in answer to that, Mr. Carson, on page 3—as to suppliers, we buy from whoever we wish and nobody can dictate to us——

Q. Well, that is in the memorandum, Mr. Ward. A. Yes.

Q. I am just calling your attention to something that I do not myself find in the memorandum, namely, whether he stated that Hanover had a policy to purchase shoe machinery, that it desired to purchase rather than to lease. A. I can't ever remember him saying that.

Q. Did anyone in the meeting ask Mr. Sheppard if he would testify on behalf of United in the pending Government case? A. Yes.

Q. What did he say? A. He said he would, if he wouldn't have to hang around the court house too long. He says—"I'd be delighted to testify on behalf of United—"

[1216] Mr. Hayes: May we say the witness is now reading from the exhibit.

You are reading from Exhibit D-25, the exhibit? A. Yes.

Q. I take it from the substance of your testimony that that is your best memory? A. Yes.

Q. There is a statement in the memorandum that any Government charges that United controlled shoe manufacturers in any way is a lot of nonsense. Who said that? A. Mr. Sheppard.

Q. Can you remember any more details that he said on that subject? A. I think he spent about forty-five minutes or an hour of that, hour and a half interview, on that very point.

Q. Tell us the substance of anything else that he said that you remember other than this one sentence. A. Well, he had just come back—I don't say just come back but it was still fresh in his mind of an experience he had had in Washington, and he was [1217] very, in my opinion, bitter at the way the Government was trying to run business and he—

Q. That is what he said, is it? A. Yes. And that he was sounding off that this case against United Shoe was a little example of Government interference in the conduct of business, and he elaborated at great length on that.

I didn't see any point in putting every sentence down because the theme was still there, that's his business.

[1218] Q. How about United's controlling shoe manufacturers, what did he say about that? A. He very definitely said that was not true, and that is how the Col. King example came in. That was particularly true with reference to supplies. That is where that question comes in, where he says about supplies, and he also mentioned in there, as I recall it, about the machine that he had purchased and they claimed it wasn't his and he claimed it was his and he won. I think it had something to do with the dies.

Mr. Carson: I offer D-25 for identification into evidence.

Mr. Hayes: I object, your Honor. The witness is here to testify.

Mr. Carson: He said this was a memorandum that represented an accurate statement.

Mr. Hayes: The witness is here, your Honor, and let him testify as to his best recollection.

The Court: Let me see that, please.

I think we will take the testimony of this witness. He may refresh himself with D-25, if he wishes.

Q. All right, Mr. Ward, using D-25 for [1219] identification to the extent you need to do so, will you tell us in full what the conversation was as regards the purpose for which you testified—withdrawn.

Tell us in full what the conversation was.

* * * * *

A. The only way I know how to get into it is to say—I did not participate in the conversation. All the conversation took place between Mr. Kiendl, Mr. Walker and Mr. Sheppard. All I did was—other than shaking hands and the usual amenities, I did not participate. I was there to take down the information and to record it in memorandum form. As [1220] I recall it, I think Mr. Walker started out—I think he knew Mr. Sheppard and I think he more or less set the stage for the interview and then after Mr. Sheppard was apprised of the purpose of our being there, Mr. Kiendl.

Q. You said Mr. Sheppard was apprised? A. Yes.

Q. Can you tell us the substance of what was said? A. I can tell you something: Mr. Walker told him that Mr. Kiendl and I were from the law firm of Davis, Polk, that represented United Shoe in this case, along with Choate, Hall & Stewart, and that we had been asked to interview some ten or 12 shoe manufacturers in the New York-Pennsylvania-Maryland region and that we wanted to talk with Mr. Sheppard about his availability as a witness and about his feeling as a shoe manufacturer and a customer of United about the specific charges the government had charged in the complaint against United.

So, then, after that little preliminary thing was over Mr. Kiendl took over and began to get into the purposes at hand.

I note in the first paragraph here that [1221] Mr. Sheppard gives his background, so that leads me to believe, and I can remember the general form of these interviews were that we would first get the man's background. That is for the purpose of our being able to assess his standing, you might say, in the industry, because, after all, we interviewed some very big people and some very small people—

Q. Excuse me. I am going to ask you to confine yourself to the conversation. What did he say about the background? A. He stated he was president of the Hanover Shoe Company—

Mr. Hayes: May it appear that the witness is now reading.

Mr. Carson: He has a right to refresh his memory.

Mr. Hayes: I would rather have his testimony than have him read that.

Mr. Carson: I am going to ask the witness to detail the full conversation using D-25 as much as he needs to and if each time he looks at it Mr. Hayes wants to comment, that is all right with me.

The Court: All right.

A. I can come close to it without even reading. [1222] I couldn't remember after 12 years whether he was chief or assistant chief of the shoe division, WPB. It says here he was chief. He says he was Deputy Director of the WPB; Deputy Director of leather and shoes, WPB. At

present—this was in 1950—he said he was a member of the technical committee of the National Shoe Manufacturers Association.

Mr. Hayes: May the record show that all of that was read by the witness from D-25?

Q. Will you proceed with your answer, please? A. Yes. Then we went to the next question, as to whether he would testify or not. If he wouldn't testify, then there was no point in our staying there.

Q. That wasn't said, was it? A. Yes, I think we told him that was the purpose of our being there, to obtain witnesses or possible witnesses for the shoe case and at the very outset he stated that he would testify in Boston if he were not required to hang around the courthouse too long.

He stated that he had several pressing engagements and we could not give him the exact time of trial. We estimated when we thought it might come to trial and told him so—Mr. Kiendl did the [1223] actual discussion—and Mr. Sheppard then said he would be glad to do so.

Then I recall Mr. Sheppard—we would take down what he said because he would go into various sidetracks on the government and I think the more he thought about the government the more he became convinced and several times stated his willingness to testify and I don't necessarily remember the order in which these points were taken up, but I can tell you what the points were, because I remember the case; One of the things that Mr. Kiendl asked Mr. Sheppard about was about the question of leasing, whether or not Mr. Sheppard objected to leasing machines from United, and that was how he got into the discussion—in

substance, he said, "The only objection I have to leasing is the fact that you lease to everybody."

Then he said that the Chamber of Commerce there in Hanover would try to bring new industry in there and they would give some new person a free plant, something like that, and then he said United would come along and by giving them the machinery it would allow fly-by-night outfits to come in here and upset his labor market.

That is what he didn't like, because it [1224] enabled them to take away from him his key employees and he used the words "fly-by-night outfits" several times—he said they wouldn't survive and in the meanwhile his business would be interrupted and it would cause not only dislocation to him personally but hurt the community and his big objection against the leasing system was that it caused too many competitors for his company.

Then we went to the question of supplies and he said he bought from whoever he wanted to and he got into the question of the Col. King incident and stated when he was quite young that he had, as I recall it, bought or thought he bought some machine or some part of a machine and later on learned that he had not.

I will refresh my memory on that—yes, sir, parts. Any how, he refused to sign the lease, he said, and said when he bought that part he didn't own it and I think that he said he was successful in his fight with United and thereafter had no trouble with them and that he had also been on good terms with United and he felt that the government case had no substance to it—another example of government trying to harass business, he said, and that he [1225] would testify.

Q. You made some reference to the statement about parts coming in; have you told us in your prior testimony what he said about parts or what anyone said about parts? I think you mentioned something about parts. A. Yes.

Q. Does that cover it? A. Well, let's see—"Any government charges that United controlled shoe manufacturing in any is a lot of nonsense."

Q. Is that what he said? A. Yes.

> "As to supplies, we buy from whomever we wish and no one dictates to us; this includes United. We take tacks and eyelets and we buy from many sources other than United. In fact, I doubt if we buy any from United at the present time. I know we don't buy our dies from United."

Q. You are reading now? A. Yes.

> Mr. Hayes: The part with "a lot of nonsense" was all reading?
>
> The Witness: I remember that very [1226] distinctly, that those were his words. Mr. Sheppard was very forceful and colorful and I have a very vivid recollection of those being his words.

Q. Have you told us all you remember him saying about charges that United controlled shoe manufacturers? A. Yes. That was the substance. He expounded at great length on a great many of those things. We let him talk. He liked to talk and we let him talk.

Q. You have mentioned several times what was said in the conservation about the government case. A. Yes.

Q. Were any statements made to Mr. Sheppard or by Mr. Sheppard as to what the government case was about?

A. Yes. Mr. Kiendl outlined to him the basis of the charges, taking each one, starting with the leases, and then ending with the question of supplies. Those were the two big issues insofar as Hanover Shoe could help us, the leases and the supplies.

Q. Can you tell us anything more than Mr. Kiendl said to Mr. Sheppard in that connection? A. I do know that Mr. Kiendl explained to him [1227] what the government's case was about and in doing so he told Mr. Sheppard enough so that he would have a layman's view of the case. This was, I think, toward the end of our trip and we had gotten our format down pretty well as to how to approach each witness and I remember vividly how that was handled.

Q. Did Mr. Sheppard make any comments on the government's case other than what you have already stated? A. No—other than saying the same things in different ways.

Q. Was anything stated by Mr. Sheppard concerning the machinery repair or maintenance service of United under the leases? A. I will have to refresh my memory.

Q. You are looking at D-25? A. Yes.

Q. Did you remember anything without looking at it? A. Yes. My memory is that he said it was quite good and very efficient and they couldn't do without it, but now I will check and see. That has been over 12 years and it is hard to remember a lot of these things. Yes, it says that.

[1228] Q. Is your memory refreshed on that subject? A. It is just as I said: He said he couldn't make shoes without United because of the continuity of operation that was so vital to a shoe company and because United had so many good road men and were there so quickly that

he was relieved of any of the worries about continuity of operation.

Q. Continuity of operation, did you say? A. Yes. If a machine breaks down and you have to wait eight, ten, 12 hours to have someone fix it, you have lost that much production. That is one of the big, strong points he made about United.

Q. On that subject did Mr. Sheppard express any resentment or objection or opposition to that situation? A. Oh, he thought that was wonderful. He said that was the only way that he could stay in business.

Q. Was there any discussion in that conversation of the amount of rents and royalties that Hanover Shoe paid to United? A. Yes, sir.

Q. Tell us the substance of that as fully as you can. A. I will have to look at the memorandum. We [1229] went into that with him—

Q. Can you remember that independently? A. No, not the exact amount without looking here. I know it is on here.

Q. All right, refresh your memory and tell us what was said. A. He said that he paid roughly 11 cents per pair to United in the rents and royalties and he said he didn't know what the cost of the cartons or the fillers would be. He said that his shoes then retailed at $7.95 and he used to sell before the war at $4 and he said that he would like to get by with paying as little as possible but he didn't think that the rents and the royalties were excessive in view of the fact that everything else had gone up. That is why he gave the example of his own shoes having risen from $4 before the war to $7.95 after the

war. He said that United charges had not gone up any more in proportion than other things had gone up after the war.

Q. Did he make any comment on the machinery investment by United A. I will have to refresh my memory on that. From the memorandum here I see that he did.

Q. What did he say? [1230] A. He stated that in view of the fact that United has such a tremendous investment in shoe machinery that obviously the amount of return they got had to be commensurate with the investment and that in that light their rentals and royalties were not excessive.

• • • • •

[1298] JOHN J. CORSON, called as a witness on behalf of the defendant, being duly sworn, testifies as follows:

*Direct Examination by Mr. Carson:*

Q. What is your business or profession, Dr. Corson? A. I have been engaged for some years in advising business enterprises and governmental enterprises on problems of economics, marketing, finance, personnel administration and organization.

Q. You practice as an individual or are you associated with a firm? A. I am a director in the international firm of McKinsey & Company.

[1299] Q. How long have you been associated with McKinsey & Company? A. I have been associated with McKinsey & Company for twelve years, and for most of those twelve years I was manager of the Washington office.

Q. How long has McKinsey & Company—withdrawn. What is the business of McKinsey & Company? A. McKinsey & Company is a firm of management consultants that advises business enterprises and governmental agencies in the fields that I have mentioned.

Q. About how long have they been in existence? A. They have been in existence since 1910.

Q. Where do they have their offices? A. We have offices in New York, Chicago, Washington, Los Angeles, San Francisco, London and Geneva.

Q. Would you give us your educational background, please? A. I was educated in the University of Virginia; I received three degrees, the B. S. degree in 1926, the M. S. degree in 1929, and the Ph. D. degree in 1932. All of those degrees were in the field of economics.

[1300] Q. After the receipt of your degrees, by 1932, did you have any further experience in the field of education? A. Yes; in the early Thirties I was the head of the economics department at the University of Richmond. Since then I have been a lecturer or a visiting professor at American University, George Washington University, Columbia University, Cornell University and Princeton University.

Q. Are you now associated with any university? A. I am a member of the faculty of Princeton University.

Q. Do you belong to any professional associations; if so, which ones? A. For most of the last decade I have belonged to the American Economics Association, American Political Science Association, American Society for Public Administration.

Q. Have you written for publication on economic subjects? A. Yes, I have written a good deal; I have written five or six books and monographs, and I have written a num-

ber of articles for such journals as the Atlantic Monthly, American Economic Review, New York [1301] Times Magazine, Nation's Business, Harvard Business Review, Public Administration Review, American Political Science Review.

Q. Have you been employed at any time by the Federal Government? A. I was employed by the Federal Government from 1936 to 1945. In that decade I served successively as the Director of the Bureau of Old Age and Survivors Insurance, as Dirctor of the United States Employment Service, and Deputy Director General of the United Nations Relief & Rehabilitation Administration.

Q. Now, did your activities in these different posts involve the employment by you of your training experience in the field of economics? A. In each of those assignments I was responsible for all activities, but all the activities included in each instance groups of economists, actuaries, statisticians and other analysts for whose work I was responsible for the planning and the direction.

In retrospect I think we were dealing with some economic problems of some substantial national consequence.

[1302] Q. Now, your answer so far has carried us to the year 1945 which you gave us as the end of your employment by the Federal Government.

What kind of work have you done since? A. Since 1945, I have ben engaged in handling problems, economic problems, problems of the analysis of financial investment, industrial relations, organizational problems, for each of two successive employers, the Washington Post Company and McKinsey & Company for most of that time.

Q. Have you recently made studies on behalf of your firm which required economic and statistical analysis and, if so, tell us briefly what they were? A. Well, over the last

few years I have made a great many studies but I can cite four which probably are the most relevant.

For the Sun Oil Company, I directed a study of the distribution of petroleum products and related products. A succession of studies, it turned out to be.

Subsequently for the Columbia Pictures Corporation, I made an analysis of the markets for the distribution of pre-1948 motion pictures for the television market.

[1303] For the Ling-Temco, Inc., I made a study of the desirability and the advantages and disadvantages of the merger with Chance Vought.

For the Southern Railway Company, I recently made a study of the distribution of grain in the Southeast and marketing problems instant thereto.

Each of those, and I cite those as particularly relevant because in each of those the study ended up in my testifying as an economic witness either in a Federal court or before the ICC, the Federal Trade Commission or the Federal Power Commission.

Q. Apart from this kind of work that you personally have done in McKinsey & Company, have you, as a member of the firm, participated in other studies done by that firm which are not under your direct supervision? A. Yes, and a great many such studies are for such corporations as American Airlines, International Business Machines, International Paper Company, Raytheon, Richardson & Merrill, Socony Mobil and a number of others.

[1304] Q. Have you read the complaint in this case of the Hanover Shoe, Inc., against United Shoe Machinery Corporation? A. I have.

Q. Are you familiar in a general way with the issues drawn by the pleadings in this case? A. I am.

Q. In preparing for your testimony in this court have you examined the five computations which were prepared by S. D. Leidesdorf & Company and which are marked as Plaintiff's exhibits in this case Nos. 37, 41, 42, 43 and 46? A. I have.

Q. In connection with these Leidesdorf exhibits have you made your self familiar with the Consumers Price Index and the employment of that index by Leidesdorf in the exhibits? A. I have long been familiar with the index and I have studied its use in these computations.

Q. Have you also familiarized yourself with the discount tables on the sale of outstanding leased United Shoe machinery which are part of the Defendant's Exhibit 35, I believe, on this record, and have you familiarized yourself with the use that Leidesdorf [1305] computations made of these discount tables? A. I have. I am familiar with the tables and I have familiarized myself with the use made of them.

Q. Have you familiarized yourself with the United Shoe Machinery Company's 1955 sale prices, which are Plaintiff's Exhibit 39 in this case, and the use which the Leidesdorf computations made of these prices? A. I have familiarized myself with these prices and I am familiar with the use made of them in these computations.

Q. Would you tell the court what, in your judgment, are the economic factors that a shoe manufacturer should ordinarily take into account and would ordinarily take into account in making a decision whether to lease or to purchase shoe machinery?

Mr. Hayes: If your Honor please, I object. There is no showing here that this witness is qual-

ified to testify as to what shoe manufacturers would or should do.

The Court: Mr. Carson?

Q. Are you familiar in the course of your studies and experience with the economic problems involved in the leasing or the purchase of commodities [1306] generally? A. I am.

Q. Will you tell the court just how you obtained that familiarity and how your experience affects it? A. In 12 years of working with the officials of the client companies that I have mentioned and a goodly number of others, the problem of lease or buy is a very common problem. The factors that a business man takes into account, whether he be a manufacturer of paper or a manufacturer of shoes, have considerable commonality. The factors are essentially the same and out of 12-years of counseling with business enterprises I would claim familiarity with the factors that they take into account. Moreover, as an executive of the Washington Post Company I was in a position to make such decisions for a business enterprise myself.

Q. Is there anything, in your judgment, peculiar or special about shoe machinery which excludes it from the considerations that you have been dealing with? A. On the basis of having spent something now approximating nine months to a year in assembling [1307] information on which I could found conclusions as to this case and, in the course of that, consulting with officials of United Shoe, in some instances, and in studying the operations of this company, I see no substantial difference in the basic factors that a shoe manufacturer or another business enterpriser would take into account in choosing between the leasing or buying of machinery.

Q. Have you familiarized yourself with the study of Dr. Anthony on the decision as to lease and purchasing of shoe machinery, Exhibit D-34 in this case? A. I have.

Q. Have you examined the writings of Professor Joel Dean on that subject, dated 1955? A. I have.

* * *

[1308] Q. Would you tell the court what in your judgment, on the basis of the experience that you have outlined, are the economic factors which a shoe manufacturer should take into account and ordinarily would take into account in reaching a decision whether to lease or to purchase shoe machinery? A. The shoe manufacturer would ordinarily weigh two alternative sets of costs: If he leases the machinery or if he leases a truck or a building he is confronted with certain current costs and recurring costs. Those are for rentals and they will often be for maintenance—those two particularly.

If, on the other hand, he purchases the machinery, he is confronted with, first, a one-time capital cost and recurring costs for the use of that capital over a period of time perhaps for maintenance, depreciation and taxes as current costs.

Now, normally if he leases the equipment the recurring current costs will be greater than if he buys the equipment. If he buys the equipment, the one-time cost will be relatively greater and the recurring current costs will likely be less, and he weighs those alternatives in making his decision as to [1309] whether he will buy or lease.

Q. I have already asked you whether you have examined the five Leidesdorf computations whose exhibits numbers I have given you and I would like to direct the

next question to these five plaintiff exhibits each of which is prefaced by a covering letter which states, in part, addressed to plaintiff's attorneys:

> "You instructed us to make this computation as a mathematical process only and that it be based on certain data and assumptions submitted by you as set forth on the accompanying appendix."

I am reading a few words from Plaintiff's Exhibit 41. Do you have a copy of that in front of you? A. Yes, sir. I am familiar with that letter and with the computations.

Q. My question is, do the computations of the S. D. Leidesdorf Company with these plaintiff's exhibit numbers in your judgment correctly depict the kind of situation that confronts a business man when in the course of business he has to make a decision whether to lease or to buy? A. In my opinion they do not.

[1310] Q. Will you explain why not? A. They do not because the business man in making a decision to lease or to buy is confronted with a prospective decision: He must look forward for an indefinite number of years and he calculates either precisely and accurately or he calculates intuitively and very generally what the net return will be over that period of years.

Here we have a set of computations which are a retrospective, as contrasted with a prospective look—a retrospective look in which a number of assumptions, assumptions which in my mind are quite incomplete, are established as the basis for the computations. They have the advantage in looking retrospectively that one can fill in some of the factors that the business man can only forecast in his mind

when he risks his capital one way or another. You know more looking back as to the life of the machinery, as to the costs of capital and other factors that will be involved.

This has the further advantage that for the year 1955 you can look back over the 16 years and one can bring these details together and make a judgment for the whole period that the business man [1311] has no opportunity to make in advance.

When you add together the incompleteness of these assumptions and the artificiality of the retrospective look, assuredly they are not reflective of the kind of situation that the business man is confronted with when he makes a choice between leasing and buying.

Q. By the way, you spoke, in passing, of the cost of capital. Did the Leidesdorf computation make any allowance for the cost of capital? A. No, they do not.

Q. Let me draw to your attention the fact that these five Leidesdorf computations which I hold in my hand, Plaintiff's Exhibit 41, each contain a series of calculations which are called, and I am referring to summary page 2 on Exhibit 41, computed net costs of leasing and computed net costs of ownership.

I would like you to tell the court whether in your opinion these Leidesdorf calculations, or any of them, do correctly state the net cost of leasing and the net cost of ownership of the machinery involved as they purported to do. A. In my opinion they do not reflect the net [1312] cost of leasing nor the net cost of ownership and they do not for three reasons:

In the first place, they do not, as I indicated in response to an immediately earlier question—because there is no provision for the cost of capital, a cost which inevitably is

involved in the ownership of machinery or in the leasing of machinery.

They do not for a second reason in that they take no account of the future worth of the dollars that the business man is investing either in the leasing of these machines or in the ownership of such machines. A business man invests his money in order to obtain a return and he expects a stream of income over a period of years or he would not make the investment. There is no allowance in these computations for such a calculation that inevitably enters the business man's mind.

Thirdly, they do not reflect either the cost of leasing or the cost of ownership for the reason that no allowance is made for the taxes that the business enterprise necessarily assumes by either its decision to lease or its decision to buy.

For these three reasons, in my opinion, [1313] they reflect neither the cost of leasing nor the cost of ownership.

Q. Of the machinery referred to in the computations? A. The machinery referred to in these computations, yes.

Q. Before I ask you details, which I would like to do as to each of these points, I would like to pause for a moment to call your attention to the fact that the five Leidesdorf computations put in evidence by the plaintiff vary among themselves as to certain assumptions relating to service costs and machinery lives. Are you familiar with that? A. Yes. There is a statement of the assumptions in the pages following the summary table and those assumptions vary.

Q. Does the variation among the exhibits with reference to either service costs or machinery lives or both affect to any material degree, in your judgment, the answer you have just given as to the correctness of the net costs of leasing and the net costs of ownership in these exhibits?

A. They do not affect that conclusion at all, Mr. Carson, for the simple reason that the assumptions [1314] vary and the variations result in the different end products for these several computations, that is, end products in the sense of a different sum arrived at as the computed net cost of leasing or the computed net cost of ownership, but no variations in these assumptions alter the deficiencies or overcome the deficiencies that I have cited:

The failure to include any recognition of cost of capital, the failure to recognize the business man's concern with the future worth of his dollars and thirdly, the failure to recognize that a business enterprise is taxed.

Q. Would you take these criticisms that you have made, beginning with the first, as to cost of capital, and would you kindly tell his Honor why you say the cost of capital should have been taken into account in the Leidesdorf computations in computing what is called there the net cost of leasing and the net cost of ownership? A. The cost of capital, in my opinion, must be taken into account for the simple reason that it is a cost that a business enterprise incurs in doing business. It is a cost just as much as the cost of the labor the business enterprise uses, the raw [1315] materials that it buys.

As Cal Coolidge once said in relation to the British loan, "They hired the money, didn't they; why shouldn't they pay for it?"

The business enterprise obtains its capital from one of four principal sources and it inevitably pays for that capital in one way or another. The failure to include the cost of capital is to my mind a simple confusion between out-of-pocket payments and true costs or economic costs. I think that confusion will become clearer if I may indicate the four principal sources of capital for a business enterprise and what a business enterprise pays for them.

Q. I was going to ask you to do that. A. The four principal sources are debt, bonded debt or current borrowings; preferred stock; common stock, or retained earnings.

These are the usual sources from which a business enterprise derives its capital. For two of those sources the cost is usually obvious. For debt the interest rate is either fixed in the indenture of the bonds or it is fixed in relationship with the borrowers, the bank or other, and there is usually little question as to whether there is a cost [1316] of such capital.

So it is with preferred stock: the cost there is usually apparent. The cost is customarily fixed in the rate of dividend provided for in the indenture for the preferred stock and this is apparent and obvious cost.

When you come to common stock, the cost is not always as obvious and yet it is nonetheless just as real. The stockholder who purchases common stock customarily does it with the prospect of receiving a stream of income—makes an investment in order to obtain a return and he will usually pay for that investment a price which is determined by the earnings that the company has. This is a very common concept in the purchase of common stocks and that ratio of earnings to price reflects the cost of that capital to the business enterprise that would sell common stock.

The fourth source of capital for business enterprises, and a one that is used with increasing frequency in recent years, is the retained earnings, the earnings that the enterprise itself makes and retains for its use either by not paying dividends or by paying out only a portion as is the customary [1317] case, of the earnings it makes.

The cost of those retained earnings is also less obvious but, nonetheless, real. The stockholder, if you look at it from a stockholder's viewpoint—the stockholder either expects earnings on the earnings that are retained, in the long

run, or he doesn't keep his capital in the enterprise. If the corporation retains those earnings for its own operations, the stockholder loses the opportunity to invest them to an advantage. This is what the economist customarily calls "opportunity cost." This is a customary concept in the evaluation of the costs of retained earnings.

[1318] Q. Do you know of an economic authority which supports the opinion you have just expressed concerning cost of capital? A. Well, there are two points in the opinion I have just expressed. The first one is that the cost of capital is an element that should be recognized in the calculations of a business enterprise.

The second thought that I have expressed in that judgment has to do with the cost of retained earnings.

I would like to answer your question separately with respect to those two.

With respect to the recognition of the cost of capital as a cost to be concerned, I think the most relevant economic authority I can cite are the two economists who were advising the parties to the negotiations in 1954-55 that had to do with the plan for terminating leases then in effect. Those two economists were Dr. Robert Anthony of Harvard University and Dr. Joel Dean of Columbia University.

Dr. Anthony in his Annex 1 to what I think is now Defendant's Exhibit 34—Dr. Anthony there states clearly that he agrees with Dr. Dean that the cost of capital should be recognized in determining [1319] whether a shoe manufacturer would be better advised to buy or to lease and give a considerable statement as to the logic of that position.

Joel Dean in his——

Q. Could I interrupt you a minute? A. Yes.

Q. You said he gives a considerable statement as to the logic of that position. What parts of D-34 do you refer to?

A. I am referring paricularly to Annex 1, and on the very first page of Annex 1 he states it in terms of his "Points of Agreement" with Dr. Dean, and he states:

> ". . . we are in agreement with Dr. Dean regarding:
>
> "The meaning to be attached to the concept of a company's cost of capital. The premise that the cost of capital of a shoe manufacturer can best be estimated by taking the weighted average of the costs of his equity capital, his preferred stock and his debt and the premise that retained earnings should be included as equity capital in these calculations."

And then on page 3, and I am——

[1320] Q. Of the same annex? A. Of the same annex. And I would cite really the whole document as the support of my point, but on page 3 in a very summary statement:

> "We are in agreement with Dr. Dean that it is necessary to have the best possible estimates of what the cost of capital is, and we are in agreement with him on the definition of the concept to be measured in finding the cost of capital of any shoe company."

I cite this simply as evidence or support of my point of view that cost of capital is a factor that inevitably has to be taken into account.

Now, Joel Dean, in his Appendix 3, devotes the whole of that appendix to the analysis of the cost of capital, and while it is difficult to find an explicit statement in which he makes essentially the point in a terse one or two sentences,

it is perfectly apparent from his calculations that he regarded the cost of capital as an essential element in the shoe manufacturer's judgment as to whether to buy or to lease.

Q. Are you referring, when you mention Dr. Dean, to the brochure which I hand you entitled "Determina- [1320] tion of Optional Sale Prices for Outstanding Machines," with a covering letter from Joel Dean dated March 9, 1955? A. I am referring to that document, and let me make sure of it—and to Appendix 3, which is described "Method for Estimating the Average Shoe Factory's Cost of Capital."

Q. You have examined that document and taken it into account in reaching your conclusions in this case, have you? A. I have.

Mr. Carson: I ask to have the Dean brochure just mentioned marked Defendant's Exhibit D-53 for identification.

(Defendant's Exhibit 53 marked for identification.)

Q. On this first point that you mentioned, have you any other specific citations of economic authority? A. I am sure I could find others, because I believe that almost any reputable economist confronted with the same problem would come to the same conclusion, but I have none others that I would cite at the moment. These two, it seems to me, suffice to make the point.

[1322] Q. Are they, in your judgment, in accordance with the weight of economic authority? A. They assuredly are.

Q. Will you refer to the second point that you mentioned previously as to the cost of capital which I think had to do with retained earnings, did it? A. Yes, the second point I made——

Q. Can you give us authorities on that subject? A. The second point I made on that subject was that retained earnings have a cost even as other forms or capital derived from other sources have a cost.

As an authority for that statement, I have several I would cite here. I have a book by Professors Bierman and Smidt entitled "The Capital Budgeting Decision." They are both professors at Cornell University, and on page 142-43 of that——

Q. Would you read into the record what you referred to there? A. "The costs associated with retaining some part of the current earnings are not always obvious. Frequently corporate officials have taken the position that these funds are without cost. If we stipulate the economic interests [1323] of present stockholders as overriding, then these funds are not free, and the cost associated with them must be measured by the opportunities foregone in using them in one way instead of in other possible ways. Essentially there are two kinds of opportunities for the use of corporate earnings. They may be retained within the corporation or they may be distributed as dividends to stockholders."

Now, he goes on to discuss the same point for a couple of pages and then in italics he presents, on page 144—or they, I should say, present their conclusion and that conclusion is:

> "The cost of using retained earnings is therefore the minimum yield that must be earned on additional investments within the company in order that the additional investment will be as valuable to the stockholder as the corresponding immediate increase in dividends."

Now, I think I could cite several other authorities and I will gladly do so. I have brought along a statement by Professor David Durand—or Durant, I think he pronounces it—at MIT, which would essentially state a similar point of view.

[1324] Q. What is the name of his book? A. His statement is included in an article entitled "The Cost of Debt and Equity Funds" and it is published in a book entitled "The Management of Corporate Capital," which is edited by Professor Ezra Solomon of the University of Chicago.

Q. What page? A. The particular citation that seems to me most pertinent to the part we are discussing is on page 112.

Q. Now, without expanding the record by the language of Dr. Durand's opinion—unless your Honor desires it or counsel desires it——

The Court: No.

Q. I will go on to ask you if you can cite further economic authority for this second point? A. Yes, I can cite also a book by Ronnello B. Lewis, who is a partner in E. F. Hutton & Company. The book is entitled "The Financial Analysis for Management," and on page 181 he makes a very brief statement which deals immediately with it.

He says there:

> "While retained earnings may appear to many as the most easily available source of equity [1325] capital, it is quite misleading to say that this source of capital represents a zero cost."

Q. Any further authority?

Mr. Hayes: What is the title of that book?

Q. Would you give us the title of the book? A. I think I did. "Financial Analysis for Management." Published by Prentice-Hall.

Q. Can you mention any further specific authority? A. Yes, I brought along one other. The remaining one that I have brought with me is a book by Professor Donaldson, Gordon Donaldson, associate professor at the Harvard Business School. The book is entitled "Corporate Debt Capacity."

The citation that is immediately on the point is found on page 60, in which he—it is a very brief paragraph, I can include it very readily:

> "Financial theory would argue otherwise. With respect to retained earnings, theoretical calculations would apply an opportunity cost which is a return that would be realized if the money were invested in the best alternative investment opportunity of comparable risk outside the company. Thus the decision to retain [1326] and reinvest depends on an internal investment opportunity which can at least match the opportunity cost."

And this becomes the cutoff point.

Q. All right, now let us direct our attention to the specific case of the Hanover Shoe, Inc. in relation to this economic principle that you have been describing.

Would you tell the Court what, in your opinion, was its cost of capital in 1939 to 1955?

First give us the conclusions, and then I will ask you to give us the sources for your conclusions. A. Well, my conclusion is that the cost of capital for the Hanover Shoe Company over the period 1939 to 1955 ranged from 14 per cent to 22 per cent.

Q. You mean it was not less than 14 per cent at any time in that period? A. In my opinion, if you look at the period as a whole, it was not less than 14 per cent.

Q. Now, would you explain your basis for this conclusion? A. My study of the financial statements of the Hanover Shoe Company indicates that the capital the [1327] company had was derived—was not derived from bonded borrowings; it was not derived except in a relatively small portion, and only at periods of time from current borrowings, it was not derived in any significant part from preferred stock, although there was, I believe, a preferred stock dividend in 1946.

It was derived from two principal sources.

Q. Could I interrupt you just a minute. I would like to be clear as to the financial statements of Hanover that you are referring to. You spoke of study of the financial statements. A. I am speaking of the annual balance sheets and profit and loss statement for the years that I have referred to, 1939 to 1955.

Q. Do you have them here? A. I have them in the briefcase under your table.

Q. They can be produced? A. Yes, they can be produced.

Q. Now, will you go forward——

Mr. Carson: I will explain, your Honor, they were produced on examination before trial.

A. I have said that the capital that Hanover [1328] used throughout this period was derived from two principal sources. Those sources were the sale of common stock to the then stockholders and this stock was, as is clear in the record—Mr. Carson, if I may correct myself, I find I have

those financial statements right here rather than in that briefcase.

Mr. Carson: All right, they can be produced if counsel wishes to see them.

Q. All right. A. The capital that Hanover used throughout this period was derived from the sales of common stock to stockholders or to members of the corporate family because the record shows the stock of this company was throughout this period closely held, and, secondly, it was derived from the retention of earnings in the company.

Now, I have developed a table which indicates the several sales of common stock throughout this period under review. The cash proceeds that were derived from the sale of stock, the price per share—this is the one designated, your Honor, as Table 1 in the very front——

Q. Are you referring to the document that was marked yesterday, Defendant's Exhibit D-47 for identification? [1329] It is the same document? Will you put the same mark on your copy.

Mr. Carson: I think your Honor has it. It is a small page.

Q. This entire document of three pages has been marked D-47—47, not 48.

Now, would you go on to explain how this document was prepared? A. At the bottom the footnote indicates that the source of the data is essentially from Hanover's answer to interrogatory No. 11-A, and in that interrogatory it indicates the number of shares issued and the cash received at each of those—in each of those several years.

I have simply taken that data, developed the price per common share, and I have taken the earnings per common share in column 5, which is developed more fully on the second sheet, and I have determined as a consequence the rate of earnings in each of those years per common share.

Now, that column indicates the rate of return that the stockholders of Hanover, whom it happens were in principal part of the corporate officials of Hanover, charged the corporation for the capital they [1330] supplied. In that sense this is the cost of capital Hanover did incur.

Q. If I may interrupt a moment, to draw your attention to answer 11-A to the defendant's interrogatories, which were supplied by plaintiff under date of April 18, 1956, over the signature of Paul Spears; is that the source you used? A. That is the material that I used.

Q. All right. Have you completed your explanation of Table 1 and the appendix thereto? A. The appendix thereto is essentially a work table which simply is supplied in order to make more clear how I have derived the data in column 5.

Q. Would you look at Table 2 in D-47 for identification and explain how that was prepared? A. This was prepared as the footnotes again indicate from financial statements submitted by the Hanover Shoe Company and compiled by Patterson, Teele & Dennis, accountants in Boston, and it was compared from—it was prepared from the data in paragraph 8 of the stipulation dated March 22, 1957.

And here what I have attempted to do is simply show the stockholders' equity as of the end—or as of the end of the preceding year in each instance, [1331] and then the profit after taxes that the company earned on that equity to determine the rate the stockholders earned on the equity they had invested in the company.

This again, in my opinion, is a reflection of the cost of capital to this company. This was the cost that the company—the stockholders expected in return for the equity they retained—they had in the enterprise.

Q. May I go back to your reference in these answers to paragraphs 7 and 8 of a stipulation of facts in this case. I show you from the appellant's appendix in this case, which contains the stipulation, paragraphs 7 and 8, at pages 31A and 32A, and ask if those are the sources you used in that connection? A. They are the sources that I used, yes.

Mr. Carson: I offer in evidence D-47 for identification.

* * *

[1335] The Court: Exhibit 47 may be admitted.

(Defendant's Exhibit 47 was received in evidence.)

Q. Dr. Corson, you have in front of you a copy of Exhibit 47? A. I do.

Q. Having explained how these sheets were made up, will you tell the court what they indicate with respect to Hanover's cost of capital in the period? A. Table 1, as I have already stated, indicates in my opinion the price the stockholders of Hanover charged the corporation that they controlled for the capital that they supplied over this period of time and that cost ranges from 7.8% in 1940, to 54.5% in 1948.

I don't think either figure taken by itself is a reliable indication of the cost of capital for the whole period. As a consequence, I have calculated the weighted average of the cost of capital over the period as derived in this manner:

The weighted average of the figures in Column 6 is 22.14%. This over the period 1939 to 1955, [1336] is the

rate at which the stockholders, when you take into account the ratio of price of stock to earnings, charged for the capital they supplied.

Table 2, which to my mind is a supplementary evidence as to the cost of capital to Hanover throughout this period, indicates in Column 4 the rate of return that the company had on the stockholders' equity. This is what the stockholders essentially earned on the money they had supplied and supplied either by the purchase of stock or by the retention of earnings and the stockholders and the corporate officials were in principal part the same.

Here is the rate of earning that they had on the capital they supplied. The average of this column approximates 14.1% and it is on these bases that I say the cost of capital to Hanover over this period ranged from not less than 14% to as high as 22%, and I would emphasize that I am talking about the cost of capital that Hanover did in fact incur.

Q. That is, you are basing it on the prices of the stock, as you indicated? A. I am.

Q. Is there any ground, in your opinion, in the facts that you have examined to conclude that the [1337] cost of capital of Hanover in this period 1939 to 1955, might have been greater than the 14 to 22% range which you have described if Hanover had purchased the shoe machinery described in the Leidesdorf exhibits? A. Yes. I think as a matter of logical reasoning the cost of capital that Hanover incurred in fact would have been greater if you assume that Hanover had purchased the machines and thus had assumed the additional, what might be described as machinery risk.

By "machinery risk," I mean if Hanover had invested its capital in the machines and had exposed itself to the

risk of machinery malfunctioning, of the obsolescence of the machinery, of the loss of economic value of the machinery, because some of the shoe products that the machinery made were no longer marketable—if you had these factors together, these machinery risks.

These are risks that the lessor, United Shoe Machinery Corporation, did in fact bear during the period 1939 to 1955. If Hanover had borne those risks, it seems to me the economist would logically assume there would be some additional cost of capital. Dr. Anthony in Plaintiff's Exhibit 34 dealing with the [1338] same point devotes, I think it is Annex 3, to this point and estimates that the assumption of this machinery risk would have added a cost he approximates at 2%. I would prefer not to attempt to estimate what it would be, but I am of the opinion that it would logically have added to the cost of capital over this period of time.

Q. In other words, in your answer you are taking no account of this factor of machinery risk? A. I am taking no quantitative account of it.

Q. By no quantitative account, you mean it does not appear in the figure 14 or the figure 22 that you fixed as the range? A. That is exactly what I mean, Mr. Carson.

Q. I will ask you to assume that in this particular instance of Hanover in the period 1939 to 1955 at all times Hanover had in its current account in the bank free cash adequate to purchase the shoe machines described in the Leidesdorf computations and ask you to tell the court whether that affects your testimony as to the 14 to 22% cost of capital. A. It doesn't. By the 14 and 22%, the approximation of the cost of capital, I am measuring what the cost of capital for Hanover was in fact during [1339] this period. Wherever it was using that capital, if it lay

idle in the bank or were invested in buildings or inventory, this is what the capital cost them.

Q. In your judgment, that cost must be taken into account in determining the cost of ownership of machinery? A. In my judgment, it must be taken into account.

Q. Assume alternatively that during this period Hanover could have borrowed the requisite funds to purchase the machinery shown in the Leidesdorf computations at the interest rate of 2%. Does that affect your previous answer as to cost of capital? A. Well, it is an incongruous assumption, if you will forgive me for saying so, because here is a company that over this period of time had substantial funds available. It is an unreasonable assumption to say that they would have allowed those funds to remain idle in the bank and gone out and borrowed additional capital. If they had, that would have been an additional cost to be taken into account.

You will recall that in the citations that I have already given it is indicated by other [1340] authorities, and it is surely a view I would support, that in calculating the cost of capital of any enterprise one essentially averages out the cost of capital derived from each of several sources. We have here in the estimate that I have given the cost of capital from the sources Hanover did in fact use. If it had in addition, no matter how much idle cash it had on hand, gone out and borrowed additional money this would have been an additional cost of that capital, not a lessened cost of that capital.

Q. In other words, the fact, if it be the fact, there was available a bank loan at 2%, it doesn't affect your answer? A. It would not affect my answer.

Q. But you say an actual borrowing at 2% would have added the 2% to your judgment of the cost of capital? A.

It would not have added 2%; it would have averaged out the total capital at a somewhat additional cost.

* * *

[1341] Q. Now, with reference to the capital of Hanover, is there any expression by Dr. Anthony in Exhibit D-34 relative to the cost of capital that would be helpful to the Court in considering your estimate of Hanover's cost of capital? A. Dr. Anthony in that exhibit, No. 34, Defendant's Exhibit 34, includes as his—and I quote his words —"best estimate"——

* * *

A. (Continuing) There he states in the final sentence of the first paragraph, "Our statistical analysis of the entire body of data that is used by Dr. Dean——"

* * *

Q. You are referring to a document which appears [1342] to be a preliminary document. Let me show you Exhibit D-34. The document which has been marked D-34 called "Revised May 7, 1955." I think you are looking at the unrevised edition. A. I believe I have.

Q. Now, the only D-34 is the revised edition. See if you can find your reference in that. A. The first, the same sentence, in the same place, on the same page of Annex 1, "Our statistical analysis of the entire body of data——"

* * *

A. On page 1 of Annex 1, Dr. Anthony writes:

> "Our statistical analysis of the entire body of data—that used by Dr. Dean supplemented with the additional figures we were able to find—leads to an estimate of 18-plus per cent as our best estimate of the cost of capital involved [1343] in this proceeding."

I think in the copy I was using it is on pages 27 and 28.

Q. Let's transpose that to the revised edition which is the exhibit. Can you find the same passage in D-34? Have you found it? What page of Annex 1 is it? A. On pages 27 and 28, he——

Q. Would you read the portion you have in mind? A. I don't find yet the 18 per cent figure which is stated somewheres on these pages as well. On pages 33 and 34 of Annex 1 in the revised edition of his report entitled "Sales Prices for Outstanding Shoe Machinery," he gives his final estimates of the cost of capital, and there on page A34 he states:

> "On the basis of this analysis, we have used 18 per cent as the cost of capital in all other calculations in this report."

The annex gives the basis for his conclusion that 18 per cent is the appropriate cost.

> Mr. Hayes: If your Honor please, I move to strike the answer because there is nothing here about Hanover in what Dr. Anthony said.

Q. My question was directed to whether or not [1344] anything Dr. Anthony said related to your conclusion about Hanover's cost of capital in your judgment. A. In my judgment, this is relevant to a consideration of Hanover's cost of capital. Dr. Anthony was estimating the cost of capital for a "typical shoe manufacturer."

If you will read this report, it will become clear that the shoe manufacturers for which Dr. Anthony was assembling data were operating in the same industry, at the same time, and ranged about the same size as the Hanover Shoe.

Hence, in my opinion, it is a relevant evidence as to Hanover's cost of capital.

It is clear that the cost of capital for any individual shoe manufacturer will vary. This is only a frame of reference in which one can view the approximations I have offered as to the cost of Hanover's——

Q. That is what Dr. Anthony says is a frame of reference, is that correct? A. That is correct.

Q. Now, what portion of the Annex 1 are you referring to when you say that it is clear that he is referring to the typical shoe company, or what is [1345] there there? Call the Court's attention to what you think makes it applicable to Hanover.

Q. He gives in this report on page A13 of Annex 1—he gives a table indicating, among other things, the size of companies that he was taking into account. This is probably better shown in section 3 of this annex entitled "Estimates of Cost of Capital of Typical Shoe Manfacturer.

Mr. Hayes: What page is that?

The Witness: This is on page A27, starting with section 3 which continues over pages through the balance of Annex through page A34.

Q. Now, have you completed your answer to the question? A. I have.

Q. Will you go on to the second of the three points you make following the cost of capital with respect to the Leidesdorf calculation and describe the concept of future worth in so far as it affects Plaintiff's Exhibit 41 and the other Leidesdorf calculations. A. I stated three reasons as to why I do not believe that the Leidesdorf computations reflect the cost of Leasing or the cost of ownership.

[1346] The second of those was that the Leidesdorf computations do not take into account the future worth of the dollars employed by Hanover in either alternative, either the cost of leasing or the cost of ownership. A shoe manufacturer as well as any other business enterpriser makes an investment either to lease, making it in terms of rentals or to buy, making it in terms of purchase cost, in order to obtain a return, in order to earn profits, and, as I said earlier, either unconsciously or precisely or intuitively and generally he calculates not just what the cost of the immediate expenditure is but what return he will—he may reasonably expect to derive from that investment.

He looks forward over the probable lifetime of the asset he would buy and he attempts to calculate what return he can derive from that investment, and he makes his choices as to investments, as to buy or as to leasing, in terms of such a prospective look as to what the return on his use of the capital he has will be.

Now, to make it very simple, it seems to me if the businessman with cash available were to put it in a bank, he would earn—in a savings bank—he [1347] would earn interest, and if he were to leave it there over a period of sixteen years, he would earn interest on that interest, and at the conclusion of that sixteen years the dollars that he had invested in that way would have a future worth substantially greater than their worth at the time he made the investment.

Now, obviously, if by the simple exercise of depositing the funds in a savings bank he will derive a future worth out of those funds, in calculating whether he will make an investment in machinery, he must calculate that at least he

will do as well or better, particularly if the capital costs money to get it in the first place.

Another illustration of the same point: If he were to borrow on the funds, if he were to borrow on them from a bank and if he were to keep them for sixteen years, what would he pay the bank at the conclusion of that period? Well, obviously the bank, if he had not paid either principal or interest throughout the period, would expect him to pay the original—to repay the original principal with interest compounded throughout the period. This is the future worth of the dollars that he was then given [1348] —he was then loaned by the bank.

Now, it seemed to me that either in the calculation of the costs of leasing or in the calculation of the costs of ownership, one must take into account the future worth of the dollars employed in either alternative.

Q. Is future worth an established economic concept? A. I think this is an accepted and established concept.

Q. How is future worth computed in this kind of situation of the purchase of a commodity or machinery? A. It is really a very simple exercise of compounding at the relevant cost of the capital employed the dollars that one invests in one way or another.

Q. Now, would you go to the third element in your previous answer about the correctness of the Leidesdorf computations, that is to say, taxes, and explain to the Court what the impact of taxes would be on purchase or on leasing of shoe machinery in the period 1939 to 1955? A. The third reason why I think the computations are useless in arriving at a judgment as to the relative [1349] cost of leasing or of ownership is that they take no account of the taxes that a business enterprise pays, and the adjustment of those taxes, if it were to buy rather than to lease.

If the business enterprise leases equipment, it pays rentals. Those rentals represent a deduction from current income taxes, both Federal and state.

During the period we are concerned with in this proceeding there were also excess profits taxes involved for a portion of the time. If the shoe manufacturer in the alternative proposes to buy rather than lease, he has a lesser current expenditure that is deductible from the income that is exposed to income taxes, and hence there is a variance that must be taken into account in comparing one with the other.

Essentially, and I assure you the business enterprises that I counter with, take into account the taxes that are involved in the decisions they make. It is certainly good business practice these days to let Uncle Sam pay a portion of the cost of your operations if that is possible to do, and where you lease, you subjected less income to taxation, and where you bought you subjected more income to taxation.

One final point I would make with respect [1350] to taxes, here in the computations that Leidesdorf has presented, you have also the assumption that machines were bought and were subsequently disposed of, and there is a deduction of disposal values.

Now, wherever the machine would have been disposed of in a period of less than the total depreciation period, and if there were a yalue remaining on the books—let me put it this way: If the disposal brought back into the company a value greater than the depreciated value of the machinery on the books, then there was in fact a capital gains, or a capital gain which was subjected to taxation and for which now allowance has been made in these computations.

These factors: Federal income taxes, corporate income tax, the state corporate income tax, the excess profits tax in

the years that was applicable, and the capital gains taxes, all, it seems to me, have to be taken into account if one would approximate the cost of leasing and the rental cost of ownership.

Q. And you find no references to taxes whatever in these Leidesdorf computations? A. I find no reference to taxes whatsoever.

Q. Now, going back over your testimony as to [1351] cost of capital, future worth and taxes, let me just ask you to be sure that I am clear:

Is there any reference or account taken of future worth in the Leidesdorf computations? A. There is no account taken of the future worth of the dollars employed in these computations.

Q. In view of the fact that these three elements, cost of capital, future worth and taxes you say are left out of the Leidesdorf computations, would you tell the Court what, in your opinion as an economist, is their value as a true comparison of net cost of leasing with net cost of ownership? A. In my opinion as an economist, these computations shed no light. They are in fact useless in reflecting the cost of leasing and the cost of ownership, relative cost of ownership and leasing to Hanover over this period of time.

Q. Now, I would like to ask you to apply for us the three concepts that you have outlined here to one of Leidesdorf exhibits and take, for example, Plaintin's 41 dealing with the machine types 1 through 20, covering letter of March 10, 1961, from S. D. Leidesdorf & Co., containing the 13.3 per cent [1352] service costs, and the historical data for machinery lives.

I think you have already said that the variations in service costs in machinery lives don't affect the outcome

substantially, is that right? A. They do not affect my judgment as to the reliability of these estimations of the cost of leasing or cost of ownership.

Q. Would you take this one, Exhibit 41, as a sample, and apply for us the three factors that you have testified should have been taken into account by S. D. Leidesdorf & Co. or by the plaintiff in submitting these exhibits? A. I will gladly do so. Let me start by referring to Plaintiff's Exhibit 41.

The first column showing dollar values to the right, headed "Computed Net Costs of Leasing."

Q. You are referring to summary page 1? A. Excuse me, I should have added I am referring to the summary that follows the letter in Plaintiff's Exhibit 41, and I am referring more specifically to the first column to the right of the dollar values. It is headed "Computed Net Costs of Leasing," and the total of that column is $1,863,679.66.

[1353] Now, in making clear what would be the effect if one takes into account the three elements that I have identified: The cost of capital, the future worth of the dollars employed and taxes with respect to the economic cost of leasing, I have developed what is now Plaintiff's Exhibit——

Q. There has been marked as Defendant's D-48 for identification a document called "Table 3." Is that what you are referring to? A. That is what I am referring to.

* * *

Q. Now, will you describe what this tabulation represents? A. Well, the title of the tabulation indicates I think, clearly what it represents. It represents the economic cost of leasing with the effect of the three elements of economic cost that I have identified, taken into account and added to Leidesdorf's computation of the net costs of leasing.

I have added these three factors into the consideration by simply taking Plaintiff's Exhibit 41, [1354] and this attempts to show what the economic costs of leasing would be if one takes into account the cost of capital, the future worth of the dollars.

Now, if I may describe this table to you, I think I can make clear how it does so.

The first horizontal line of figures which is under the heading "Leasing Costs are overstated to the extent that capital would have been recovered through tax savings when rentals were deducted from income as an expense."

Now, line designated A, the first horizontal line of figures, is taken from the Leidesdorf computation which is Plaintiff's Exhibit 41. If you will notice the figure in the column to the far right, $1,863,680, that is the identical figure that is found in the Leidesdorf computation in which I have only rounded off to even dollars.

Now, that horizontal line of figures simply represents by years rather than as Leidesdorf by individual machine the costs of what Leidesdorf describes as the computed net cost of leasing.

So I start with the Leidesdorf figure. Then in the second horizonal line, the relevant rate at which income was taxed, I have stated a derived rate [1355] of taxes which brings together the Federal income tax, the excess profits tax in the years in which it was applicable, the state corporate income tax, on the proportion of Hanover's income that was subject to corporate income tax in Pennsylvania, I have brought these factors together in that figure stated on this second horizontal line, year by year.

The third horizontal line is entitled "Capital Recovered Through Tax Savings."

Now, when Hanover paid in the year 1939 $25,520 as a rental, it subjected that much less corporate income to taxation, and to that extent it saved—this is a common concept in business usage—a tax savings as a result of that expenditure, so that the net capital employed in leasing, the net cost to Hanover of leasing that year—I am suggesting by this table—was $19,344 in the year 1939 rather than the $25,520 stated in the Leidesdorf computations.

Now, proceeding to the fifth horizontal line of figures, that designated as 2A, the future worth of net capital employed, that is its value on September 21, 1955, is calculated by multiplying the net capital employed in leasing, item 1D, that is the figure just above the $19,344, by a factor which compounds the [1356] annual figure at 14 per cent. That is, at the rate of the minimum rate of Hanover's cost of capital.

So the future worth of the net capital employed in leasing is arrived at by multiplying the $19,000 by the factor that I have just indicated to arrive at the total value of that leasing or the total leasing cost over a 16-year period of $179,445.

Now, the longer the capital is tied up, the more the cost over a 16-year period is inevitably going to be, so that I have calculated that for the 16-year period—and here I am especially concerned with getting a comparable figure, comparable with a prospective cost of ownership—I have estimated that the cost of leasing, the economic cost of leasing, approximated $2,247,753 for the total 16-year period, and that is to be compared with the figure presented in the Leisdesdorf computation of $1,863,679.

[1357] Q. This document, as you have said, is confined to the economic cost of leasing only, isn't that right? A. That is correct.

Q. And the total to which you have testified is predicated, as I understand, on the tax rate which you have stated in this document year by year through the period 1939 to 1955? A. That is a factor that is taken into account here.

Q. And this tax rate, as shown by the document, varies a good deal, doesn't it? A. Yes. Taxes over that period of years did vary.

Q. I am going to ask you to describe the manner in which you come to the tax rate and I call your attention to D-49 for identification. Was this prepared by you or under your supervision? A. This was prepared under my supervision.

Q. Will you describe what it is. A. This table is an attempt to derive a marginal income tax rate that would permit one to approximate the tax savings involved in either leasing [1358] or ownership.

Q. Could I stop you just a minute?

What is the significance of the word "marginal"? What do you mean by "marginal tax rate"? A. The significance of the word "marginal" is that if Hanover had had additional income exposed to taxation its rate in several years would have been greater than it did in fact pay. It was the tax rate that would have been applicable to the next increment of the income under existing tax statutes.

Q. Would you go on and explain what D-49 for identification is? A. If I may, I ask that you look first at page 2 of the two tables that make up this exhibit. In that table, in the first column, headed "Federal Normal Income Tax Rate," I have attempted to state the applicable normal income tax rate prevailing in that year, and then I have attempted to state in the second column the excess-profits tax rate applicable to Hanover and then there are com-

ments which were prepared under my supervision and which I hope make clearer why there was no excess-profit statute, for example, in 1939 and what was the rate [1359] used in other years.

The last column to the right essentially brings together these two figures in a composite figure, which I describe as the effective federal tax rate. That figure, then, is carried over to the first sheet and you will find that the last column to the right on page 2 is identical with the first column to the left on the first page of the table.

Q. Which is also entitled "Effective Federal Tax Rate"? A. Which is also entitled "Effective Federal Tax Rate."

Then in the columns to the right I have endeavored to do three things:

First I have endeavored to interrelate the federal and Pennsylvania State taxes, first for those years in which the federal income tax was allowed as a deduction, the years 1939 to 1942, and then, secondly, I have attempted to determine the proportion of Hanover's income that was taxable by the State of Pennsylvania—that is, to allocate that portion of the income that was subject to taxation in the state—and, thirdly, I have attempted to bring together the effective Pennsylvania [1360] tax rate and the federal income tax rate to arrive at the tax rate that I have used in these tables.

Q. That is the last column on Exhibit D-49 for identification? A. That is correct.

Q. So that you state that the figures appearing in the righthand column, on the first page of D-49 for identification, are the same figures that you have applied year by year in Exhibit D-48 for identification against the Leidesdorf net costs of leasing in each year? A. That is correct.

Q. In order to get what you have previously described as the capital recovered through tax savings and the net costs of leasing in each year? A. That is correct.

Q. As shown by D-48 for identification? A. Correct.

Q. Could I ask you to explain how you worked out the future-worth figure that you have used in the item called 2-A of D-48 for identification? A. I said only a few moments ago that the calculation of future worth is really the simple exercise of compounding the value of the dollars [1361] employed to the relative cost of capital. The table that I prepared that is now designated as Exhibit D——

Q. I think there was a table marked yesterday in your absence which is called table 5 and it has been marked D-50 for identification. Is that the one you are referring to? A. This is the one I am referring to. All this table does is simply to indicate how I have derived the future-worth factors that I have used in D-48, and are presented in line 2-A in D-48. I have simply taken here fourteen per cent, which was the lowest point on the range I suggested as the cost of capital to Hanover, and I have shown here how that grows as compounded from year to year over sixteen years.

One could do this just as readily by taking a book of compound interest tables and taking the figure from there. I thought it might add some clarity by including this.

Q. The figure that you obtained over the period is what figure, using the rate of fourteen per cent? A. Well, if the capital was employed throughout [1362] the sixteen years, that capital would be compounded at a rate of 9.276 plus. This capital, however, was not static throughout these sixteen years. They was more or less employed either as rental payments or leases or would have been employed as purchase prices for machinery, so that the amount of

capital employed throughout the period varies from year to year and that has been taken into account.

Q. You mentioned purchase price of machinery. I want to be very clear that so far we are discussing in Exhibit D-48 for identification only economic cost of leasing. A. That is correct.

Q. That is not the purchase price? A. That is not.

Q. The figure you derived on Exhibit D-50 for identification was applied on D-48, was it? A. It was.

Q. And where and how? A. It was employed in line 2-A, the fifth horizontal line of figures.

Q. By applying that figure of 9.2765 for the year 1939 on the net capital employed in leasing, you arrive at the future-worth figure of $179,445, [1363] do you? A. That is correct.

Mr. Hayes: I am sorry to interrupt but did I understand that you said that the 9.2765 comes from Defendant's Exhibit 50?

Mr. Carson: Yes.

Mr. Hayes: Would you point it out to me, please?

The Witness: If you will look in the last column to the right of Defendant's Exhibit 50, in the final column, at the bottom, you will see 9.27646417. That has been rounded off to 9.2765 in its usage in Defendant's Exhibit 48.

Q. On Exhibit D-50, for the preceding year, you have a figure of 8.137 and so on. A. That is correct.

Q. As a result of applying the fourteen per cent for future-worth purposes over a period that is one year shorter? A. Right.

Q. Is that the same figure that you have utilized on Exhibit D-48 for identification in the year 1940? A. It is the same figure, rounded off to the [1364] fourth decimal point.

Q. For the purpose of obtaining the future worth as of 1940 of the net capital which was actually employed in leasing, as you computed on D-48, is that right? A. That is correct.

Mr. Carson: I offer in evidence Exhibits D-48, 49 and 50 for identification.

The Court: Any objection, Mr. Hayes?

Mr. Hayes: If your Honor please, I have several objections to——

Which were the ones you offered?

Mr. Carson: 48, 49 and 50.

Mr. Hayes: I have several objections to these. Take Exhibit 48, for example. Taxes are shown here as an adjustment. It is well established that taxes haven't a thing to do with it because plaintiff, if it recovers here, has to pay taxes on the recovery, to begin with. That is without elaborating, your Honor.

The Court: Do you want to postpone until the cross-examination is finished? Do you have to have it in evidence now, Mr. Carson?

Mr. Carson: I can wait, your Honor. I [1365] think it is a little easier if we have the document in evidence while the witness testifies, but there has been no objection as yet to testifying from an exhibit for identification.

Your Honor appreciates that we are trying to measure the true and fair comparison between the cost of ownership and the cost of leasing and we

submit it is obvious that to get a true and fair comparison you must take current annual taxes into account.

The Court: If you establish, Mr. Hayes, that factors have been considered which should not have been considered, I don't think that keeps these out of evidence.

Mr. Hayes: I have a further objection, your Honor, and that is that these tabulations—and this really goes to cross-examination, in a sense—that these tabulations go far beyond, to put it this way, what Mr. Carson, when he objected to the Leidesdorf reports—if I recall the word, he said "fantasmagoria."

Here we find, on Defendant's Exhibit 48, as I understand it, that the Leidesdorf computed net costs of leasing was $25,000, and I assume he [1366] has that accurately prepared, the copy, and winds up with a future worth of net capital employed in leasing of $179,000.

The Court: That is right.

Mr. Hayes: Maybe we should amend our complaint to plead on the basis of $179,000, which was our cost——

The Court: When you get the cost of purchasing machinery——

Mr. Hayes: I am sure it will be offset, yes. They come out with a counterclaim against us, your Honor.

The Court: I am going to admit these and if I am wrong it can be corrected later. I think your cross-examination and arguments may present them in a different picture, but I certainly think that the

proper foundation has been laid and I think that they are relevant and at this time I will admit those exhibits, 48, 49 and 50.

Mr. Carson: We shall ask your Honor to weigh them against the future exhibits which have been marked for identification and the cost of ownership.

The Court: That is right.

[1367] (Defendant's Exhibits 48, 49 and 50 received in evidence.)

Q. I interrupted you somewhat, Dr. Corson. I am not sure whether there was anything further that you intended to say or that you wished to say concerning the construction or the import of Defendant's Exhibits 48, 49 and 50 at this time. A. No, there is nothing I wish to add with respect to those three exhibits.

Q. Then to sum up the effect of Defendant's Exhibit 48, as you have stated, do I correctly understand that as against a leasing cost that S. D. Leidesdorf, Exhibit 41, computed for the machinery involved at a total of $1,063,680 for 1939 to 1955, you, on the basis you have stated, would substitute as a true leasing cost $2,247,753? A. I would.

[1368] Q. Now I would like you to pass on to the other item dealt with by the Leidesdorf tabulations, the net cost of ownership taking Plaintiff's Exhibit 41 as a sample.

* * *

Q. Will you tell the court in your judgment and opinion the three factors of capital cost, future worth and taxes would affect the figures presented by Leidesdorf in that exhibit? A. Again, if I may start by referring to Plaintiff's Exhibit 41 and to the summary table that follows the letter, and to the second column of figures to the right, that column is headed "Cost of New Machinery Acquired" and the total

of that column is $1,681,585.84. This is stated as—to repeat the title "Cost of New Machinery Acquired."

Q. May I see the document from which you take that figure?

(Witness hands document to counsel.)

Q. All right, would you go on? A. Now, I have developed a table to incorporate into the calculation of the cost of ownership the three [1369] factors that I have previously identified and discussed and that table is presented as Defendant's Exhibit—what, Mr. Carson?

The Court: 51, isn't it?

Mr. Carson: I have to find it. I think Table 6 was marked Defendant's Exhibit 51 for identification.

Q. Is that the one? A. That is correct, that is the one I refer to.

Now, starting again with Plaintiff's Exhibit 41, if you will look at the first horizontal line of figures in D-51, you will find that I have reproduced Leidesdorf's cost of new machinery acquired, and I have in the far right column of that first horizontal line that same total, $1,681,586. Again I have rounded it off.

I have simply presented in that line of figures the same data presented by Leidesdorf. I have presented it by years, Leidesdorf has presented it by machine.

Now, the purpose of my including that there is to demonstrate that the ownership calculations in Plaintiff's Exhibit 41 do not state the full [1370] economic costs of ownership; they do not reflect the effect of income taxes, capital gains taxes and the cost of capital employed. I attempt in this table to demonstrate that conclusion, or to support that

conclusion, in three different ways: First, the table adjusts the value of new machinery acquired as it is stated by Leidesdorf to take into account two factors: One, depreciation, and two, the tax implications of the payments or of the depreciation expense.

And the section one of that table of D-51 simply takes the Leidersdorf figure as to the cost of new machinery acquired in each year, indicates the depreciation that would have been taken into account in that year, again applies the relevant tax rate to get at the tax savings resulting from that depreciation, and arrives at a net cost of the new machinery acquired.

Then, the second section of this Defendant's Exhibit 51 attempts to take into account the disposal of machinery throughout that period. I again have taken the figures that are presented by Leidesdorf in Plaintiff's Exhibit 41 as my starting point, and there in Line 2-A, I state the disposal recoveries as determined by the Consumer Price Index [1371] derived from Plaintiff's Exhibit 41. I have here presented them year by year in total from the Leidesdorf computations.

In Line 2-B, I have endeavored to present those recoveries, these disposal recoveries that were subject to capital gains, that is, those machines that were disposed of at a value, and the value again is the value that Leidesdorf has set in the computations, that was in excess of what the depreciated value would have been. It seems to me the business man inevitably would recognize that this is subject to taxation, and here I have in Line 2-C of Defendant's Exhibit 51 stated the relevant capital gains tax rate.

Then in Line 2-D, multiplying the capital gains tax rate by the item listed in Line 2-B, I have arrived at the actual capital gains taxes that would have been paid. It is not a

major item in any year, but it is a relevant item that I would argue must be taken into account, and finally in Line 2-E, I have indicated the after-tax disposal recoveries.

In summary, in that section 2 of Defendant's Exhibit 51, all I have done is to adjust the Leidesdorf figures as to recoveries for the machines that were disposed of by the capital gains that—capital gains [1372] taxes that would have been applicable to them.

Then in the third section of this exhibit, Defendant's Exhibit 51, I have determined the 1955 worth of the net capital employed in ownership, that is, the cost of new machinery acquired less the sums recovered by the disposal of used machinery, and you will notice that Line 3-A is simply a reproduction of Line 1-E. I simply have brought down here the cost of new machinery acquired after one takes into account depreciation and the taxation implications, or tax implications of that depreciation expense, and in the next line, Line 3-A-2, disposal recoveries, I have similarly brought down the item arrived at in 2-E, and then I have subtracted one from the other.

In the last two lines of Defendant's Exhibit 51, I have, as I did in the calculation of the economic cost of leasing, derived the future worth of the dollars that were employed in each year, and you will notice that in some years—in that line I refer specifically to Line 3-B-2—in some years there was a negative figure. The amount of capital that Hanover had employed was reduced in those years, and as a consequence, I have reduced the further worth calculation for those years.

[1373] In total, this Defendant's Exhibit 51 demonstrates that the economic cost of ownership to Hanover for the machines that are dealt with in Plaintiff's Exhibit 41 would have been $3,197,000, rather than $1,681,000, as shown in Plaintiff's Exhibit 41.

Q. Do I correctly understand that in computing the economic cost of ownership you have applied to the Leidesdorf figures the same three concepts of cost of capital, future worth and tax impact that you applied in considering the economic cost of leasing? A. I have.

Q. And have you applied them on the same principles? A. Oh, exactly the same.

Q. Have you attempted in these exhibits to make any other changes or corrections in the Leidesdorf calculations except to take account of cost of capital taxes and future worth? A. No other changes than to add these three elements in arriving at the cost of leasing and the cost of ownership in comparable terms.

Q. Now I would like to ask you some details about the manner in which you have dealt with depreciation, taxes, so-called disposals and future worth on D-51 for identification, but I think, your Honor, perhaps we better take our recess before we get into that. [1374]

* * *

[1375] Q. Dr. Corson, may we go back to D-51 for identification for the purpose of clearing up certain details for me. I take it that as shown on this exhibit, you have applied these three factors of capital worth, taxes and future capital costs—future worth and taxes—to show the extent to which costs of ownership of the machinery involved in Plaintiff's Exhibit 41 are overstated by Leidesdorf and also the extent to which they are understated in order to arrive at the result you give on this Exhibit D-51? A. That is correct.

Q. In other words, you felt that to make a fair assessment of the ownership costs on the basis used by Leidesdorf, these corrections would be necessary? A. That is,

to take into account all of the factors, it should be taken into account in arriving at a cost of ownership. These adjustments are [1376] essential to the Leidesdorf computations.

Q. But I understand from your prior testimony, and correct me if I am wrong, that apart from future worth, cost of capital and tax impact, you have not changed any of the elements in the Leidesdorf computation, is that correct? A. That is correct.

Q. Do you express any opinion as to whether the economic cost of ownership given by Leidesdorf with those three corrections is a true economic cost or not? A. I think this is as nearly a true economic cost as one can arrive at in looking back over a 17-year period of time.

Q. You have, according to this document, used the assumptions—do you have the exhibit in front of you? A. I do.

Q. You have used the assumptions at the bottom of the page that Leidesdorf used? A. That is correct. They are taken——

Q. As stated there? A. As stated in Plaintiff's Exhibit 41, in the pages that succeed the summary table and are headed [1377] "Assumptions and data used in the computation," et cetera.

Q. As they are stated, among the assumptions, you have taken the consumer price index, have you? A. That I have.

Q. I will ask you about that later. In the meantime, I want to draw your attention to the item that you have called on the exhibit 1-B, "Depreciation." Would you tell the Court how you calculated that? A. I calculated it the simplest possible way, and I think this is a reliable way for machinery of this type:

I assume it would have been depreciated on a straight line basis over a 10-year period. That is, you would depreciate one-tenth of the value in each successive year. You

will notice the figure included on that horizontal line under the year 1940 is one-tenth of the value stated in the line above, in 1939.

The figure in 1939 is for half a year, since it is assumed that these machines were acquired as of July 1, 1939.

Q. That is a Leidesdorf assumption? [1378] A. That is a Leidesdorf assumption.

Q. You yourself express no opinion as to when they would have been acquired? A. I have no opinion on this. I simply started with the Leidesdorf computations and added these three elements.

Q. What was the purpose of your taking depreciation into account in this calculation? A. If a business owns the machinery, they do encounter depreciation as a cost. The machinery does wear out through usage and it seems to me it is impossible to make a calculation as to what the cost of ownership would be without taking into account depreciation. That is my reasoning.

Q. Is that related to the tax impact? A. It is related to the tax impact in that if depreciation is taken into account then you have a deduction from the income that is exposed to taxes and that deduction represents essentially a tax saving against that machinery cost.

Q. Did you think it was necessary to take that into account in order to make a fair assessment of the cost of ownership, among other things? A. I did and I so took it into account here in [1379] line 1-D and in the deduction of 1-D that is shown in line 1-E.

Q. You have previously testified about a marginal tax rate for Hanover in the period which you have derived through a previously marked exhibit, have you not? A. I have.

Q. Are the tax rates for the respective years, on D-51 for identification, those same tax rates? A. They are the same tax rates.

Q. In item 2, or paragraph 2, of D-51, where you enumerate the elements where ownership costs are understated by Leidesdorf, according to this document, you mention in subdivision (b) disposal recoveries. What disposals were you referring to—subdivision (a) also. A. By the term "disposals," and here again I am using a term that Leidesdorf has used in Plaintiff's Exhibit 41, in the third column to the right—Leidesdorf shows the reduction of costs of ownership by disposals of used machinery.

Essentially it has assumed by this computation that machines that were turned back would be turned back at the value set in the discount table [1380] you referred to earlier this morning and that that value would be deducted from the original hypothetical purchase price in order to get at the net cost, or the computed net costs of ownership, as they are designated in Plaintiff's Exhibit 41.

I have started, and the disposals I refer to here—to be more specifically responsive to your question, that figure is taken, as I stated this morning, from Plaintiff's Exhibit 41.

The total of $2,260,801 shown at the bottom of the third column of figures to the right in the summary total of Plaintiff's Exhibit 41 is the same figure as I show on line 2-A in this exhibit, D-51.

Q. Do you have any independent knowlege or opinion apart from the Leidesdorf tabulation as to what these disposals are? A. These disposals are, in fact, a mathematical computation of the number of machines on hand at the end of the year. They are not, in fact, disposals in the sense that a machine was turned in at a particular time, but this is one of the foundations of Leidesdorf's computation and

I have followed precisely the same method that Leidesdorf has in order to show the effect if these three additional elements [1381] are taken into account.

This is, in my mind, part of the artificiality of the very computations that have been submitted in this proceeding.

Q. In the same subdivision 2 you have reflected in the years 1949 and following capital gains taxes. Why do you do that? A. I have reflected those capital gains taxes to reflect what it seems to me must be recognized as the inevitable consequence of ownership of machines. If those machines are disposed of at a price greater than the depreciated value on the books, there is a value that would be subject to capital gains taxation and this is simply an effort to demonstrate what that amount would be.

Q. And you found no such item of capital gains tax reflected in the Leidesdorf tabulations? A. I did not.

Q. In paragraph 3 of D-51 for identification, you have a calculation of future worth of net capital employed. Would you explain that? A. Here I have done two things, and only two: I have taken the ownership costs adjusted for income taxes from line 1-E and I have reproduced that at [1382] the lower half of this table and I have subtracted from that line, 3-B-2, the disposal recoveries, which is taken from line 2-E, which is the value of the machines, the used machines disposed of after ad, stment for capital gains.

I have subtracted the value of the machines disposed of from the value of the machines required to get at the net capital employed in ownership, how much capital would have been employed in the ownership of these machines at each year throughout this period of time, and, hence, how much capital did Hanover have employed throughout this other period of time in the ownership of these machines if it had in fact purchased them, and that is shown on the last

line, line 3-B-2, of Defendant's Exhibit 51, in which the end result over the 16-year period is $3,197,000.

Q. Looking at the application of the future worth factors, in the first year, 1939, I see that you start at the top of the column, 1939, with the cost of new machinery acquired, 1-A, which is $356,490. A. Yes.

Q. You get that from Leidesdorf Exhibit 41? A. Yes.

[1383] Q. By the processes reflected in the year 1939, according to the text of this document, you come down to a net capital employed in ownership for that year of $352,176. A. I would correct your statement only to say that is the future worth of the capital that was tied up for sixteen years. That is the worth of that capital in 1955.

Q. What is the worth of that capital—will you use figures to explain that? A. The actual capital expended or invested in that particular year is shown in line 3-a-3, $352,176. Those were put into this business then——

Q. On the Leidesdorf assumption? A. Yes. They were put into this business and they were retained in this business for a period of years.

A businessman who wants to make money, and presumably businessmen do, doesn't put his money in without expecting a return on it and a return that is equivalent to what he should get elsewhere. If he could get as much in a savings bank by letting it sit there and accumulate interest, with interest on that interest, I don't see any reason why he would put it [1383a] into shoe machinery for a lesser return.

All I have assumed here is that that money, $352,176, which was—would have been invested in shoe machinery, had Hanover purchased machinery in that year, would, over those sixteen years, in the year 1955 either have been

worth $3,266,961 or Hanover wasn't getting the return on its investment that it was paying for its capital.

[1384] Q. The purpose of my question was to ask you to explain to us what you did to the $352,176 on Line 3-A-3 in order to get the figure of $3 million-odd. A. Simply multiplied it by the compound interest factor of 9.2765, which as was pointed out this morning, is the compounded interest at 14% for 16 years.

Q. That figure comes from an exhibit D-50, does it, that you have explained this morning? A. It does.

Q. And the next year, 1940, you have the figure of 8.1372 for the same factor? A. That is correct.

Q. Which comes from the same exhibit and so on? A. That is correct.

Q. Now would you explain to us how you get a negative figure for the cost of new machinery acquired in the year 1940? A. In that year the—as a result of the deduction of depreciation the actual capital that Hanover would have employed by the end of the year would have been reduced by the sum of $10,303, and hence since the actual capital employed is reduced by that calculation, I have similarly applied the [1385] compound interest factor and effectively reduced the sum that had been invested in the earlier year by the amount that had been regained through depreciation on the machinery in the year 1940.

Q. So for the year 1940 you are reflecting a saving; is that correct? A. That is correct.

Q. And so on through the following years according to the footing of the columns of each year, you have either a charge for ownership or saving for ownership through to the end; is that correct? A. That is correct.

Q. Ending in the over-all figure of $3,197,473? A. That is correct.

Q. Which you would say on the Leidesdorf computations would be the cost of ownership of this shoe machinery if they are corrected by the three factors that you mentioned? A. That is correct.

Mr. Carson: I offer in evidence D-51 for identification.

The Court: Any objection?

Mr. Hayes: Same objection, your Honor.

The Court: Overruled.

[1386] (Defendant's Exhibit 51 was received in evidence.)

Q. Now using these two exhibits which show the economic cost of leasing, D-48, and the economic cost of ownership, would you explain to the court what in your opinion would be an accurate comparison of the net cost of leasing and the net cost of ownership as Leidesdorf has computed it in Exhibit 41, if you give effect to the three corrective factors you have testified about? A. If you give effect to these three factors, the end products of each of these two tables, that is, Defendant's Exhibit 48 and Defendant's Exhibit 51, taken together, provided a comparison of the economic cost of leasing and of the economic costs of ownership. I have brought these two sets of figures together in what is identified as Defendant's Exhibit——

Q. 52 for identification, marked yesterday? Is this your table, Table 7? A. That is correct.

Q. And that's the one headed comparison of Hanover's economic costs of leasing with its economic cost of ownership? A. That is correct.

[1387] Q. Now, would you explain just how this is made and what it shows? A. In this exhibit, Defendant's

Exhibit 52, I have in the upper part of the table simply reproduced the data from the Leidesdorf computations in Plaintiff's Exhibit 41. On the first line I have reproduced the computed net costs of leasing. The only difference from the figures I presented here and those presented in Plaintiff's Exhibit 41, on the summary table in the first column of figures to the right headed "Computed Net Costs of Leasing" is that I present the data by years; Leidesdorf has presented it by machine type.

Similarly, in the second line of this table, that is, Defendant's Exhibit 52, I have duplicated here Leidesdorf's figures under the heading "Computed Net Costs of Ownership" from the same Plaintiff's Exhibit 41.

Again, my only differentiation is that I presented by years; Leidesdorf presented them by machine type.

Then, in the third line in Defendant's Exhibit 52, I have subtracted one from the other, as essentially Leidesdorf does in Plaintiff's Exhibit No. 41, to get at what's in Plaintiff's Exhibit 41 described [1388] as the excess of computed net costs of leasing over computed net costs of ownership. That is shown in Plaintiff's Exhibit 41 in the last—in the summary table—in the last column to the right, the total shown in Plaintiff's Exhibit 41 in that column as $1,408,894.

In the third line of Defendant's Exhibit 52, you will notice that in the far column to the right I have the same total simply rounded off to the even dollars.

Now, this is, this upper half of Defendant's Exhibit 52, is simply a duplication of the Leidesdorf computation of net costs of leasing, net costs of ownership and the difference between them. In the other half of this table, I have presented what is in my opinion a more accurate comparison

of the economic costs of leasing with the economic costs of ownership.

I have shown in Line 4 the economic costs of leasing which are taken from the last line, Item 2-B, in Defendant's Exhibit 48, and I have shown that by years. Then I have shown in Line 5 the economic costs of ownership taken from Defendant's Exhibit 51 in Item 3-B-2, and in Line 6 of Defendant's Exhibit 52, I again have simply subtracted one from the other, [1389] and at the far right-hand column, I have indicated that the excess of costs of ownership over costs of leasing are approximately $950,000.

That is to be compared to the excess of costs of leasing over costs of ownership as shown by Leidesdorf in Line 3 of this same exhibit, Defendant's Exhibit 52, as $1,408,000, and that is an excess cost of leasing as distinguished from an excess cost of ownerhip as shown in Line 6.

Q. Whereas, the figure of $949,000-odd represents in your opinion, a more accurate comparison? A. In my opinion it represents a more accurate opinion.

Q. And you have given the reasons based on these three factors that you have talked about? A. I have.

Q. And again to make it clear you have taken as a basis for this opinion, in addition to those three factors, and in every other respect, what Leidesdorf used? A. I have.

Q. So that if Hanover had actually purchased all the machinery dealt with by it in this period, in your judgment even on the Leidesdorf assumptions, [1390] a correct economic consequence would be that the purchase would have cost it $949,000 more than it actually spent for leasing? A. That is correct.

Q. Now, in these assumptions which you have reflected in your exhibits—withdrawn.

Mr. Carson: At this time, your Honor, I think I will offer in evidence Defendant's Exhibit D-52 for identification.

Mr. Hayes: Same objection, your Honor.

The Court: Overruled, it will be admitted.

(Defendant's Exhibit 52 was received in evidence.)

Q. In dealing with the Leidesdorf calculations as some of your exhibits reflect you have used, have you, the Consumer Price Index? A. Leidesdorf used the Consumer Price Index, and as a consequence in using their figures I have adopted the Consumer Price Index.

Q. In your opinion, as an economist, is the Consumer Price Index a proper index or a proper method for the comparison of machinery prices in 1955 with prior years? A. It is not.

[1391] Q. Will you tell the court why not, in your opinion? A. The Consumer Price Index, published by the Bureau of Labor Statistics, regularly attempts to measure the cost of living for wage earners, clerical workers. It is an index of the prices of the commodities that wage earners and clerical workers purchase as their cost of living. The index is constructed to measure the reflection of the cost of those items: Food, clothing, toys, and a variety of other items that go into the cost of living of a wage-earning family.

The index is constructed to give appropriate weight to each of these items to the extent that they go into the living costs of a typical wage-earning family. For example, the weight given to the cost—the prices of food in constructing this index is about 40% of the total and reflects the costs of the—the changes in the cost of food. Similarly, the cost of

clothing, as I recall, amounts to about 18%, the weight given in arriving at this index, and rents, for example.

These are not factors that are relevant to the conversion of the prices of shoe machinery [1392] in the year 1955 back to what shoe machinery would have cost in an earlier year.

Now, the cost of food is, at the least, of slight relevance to the conversion of the cost of shoe machinery. The forces and factors that determine the cost of shoe machinery are not necessarily the same that determine the cost of food, and as a consequence, it seems to me that at very best this is a crude way of converting the prices back. I would consider it an improper use of the Consumer Price Index.

* * *

[1467] *Cross Examination By Mr. Hayes* (Continued):

Q. Dr. Corson, you are still associated, are you not, with McKinsey & Company? A. I am.

Q. Is that your full-time employment or not? A. It is not.

Q. What other employments do you have? A. As I testified yesterday, I am a member of the Princeton University faculty.

Q. Do you teach regular courses at Princeton? A. I do.

Q. What courses? A. I teach a course in practices and processes [1468] of management, a graduate seminar.

Q. A graduate seminar? A. Yes.

Q. How long have you been doing that? A. Since September 15—since the opening of school in fall.

Q. Just this fall? A. Yes.

Q. Since you left the University of Richmond, have you taught full-time courses in any other Universities? A. I testified yesterday that I had taught at the University of

Richmond and had been head of the economics department of that institution.

Q. I said since you left the University of Richmond. A. Excuse me. Since then I have not taught full time.

Q. You were a visiting professor at American University? A. I was.

Q. When was that? A. I can't tell you. I think it was in the years of '40 to '51 or '52, in that neighborhood. It [1469] was the latter part of World War II, to the early Fifties.

Q. Was that your sole employment at the time? A. No.

Q. With whom else were you associated at that time? A. During World War II I was associated with the United States Employment Service and subsequently I was Deputy Director of UNRRA, and after World War II I was an executive in the Washington Post in charge of their market research programs, among other things.

Q. What did you teach at the American University? A. As I recall, I taught courses there in the economics of social security.

Q. When were you at George Washington University? A. As I recall, I taught there, off and on, in the early Fifties; probably two to four years.

Q. And what courses? A. There I think I taught a course in the economics of social security—I don't know. I can't recall what else I taught there.

Q. When were you with Columbia? [1470] A. In the early Fifties. I have forgotten whether my title was visiting lecturer or visiting professor. I taught for two years in the Columbia Graduate School.

Q. What subject? A. The economics of social security again.

Q. When were you at Cornell? A. In the years '55, '56, I think—'54 to '56, thereabouts.

Q. Were you visiting lecturer there? A. I was visiting professor on the faculty.

Q. What subject? A. I taught the economics of business policy.

Q. Where do you reside? A. I reside in Princeton, now.

Q. Princeton, New Jersey? A. Princeton, New Jersey.

Q. I think you testified that you have been working for nine months on the analyses which eventuated in the schedules you produced yesterday and in the testimony you gave yesterday. A. I testified nine months, but actually, in looking at my records overnight, it was more than that, it was at least a year, and of course during that year [1471] I had other engagements that took my time.

Q. I wasn't trying to suggest that it was full time, Doctor.

Did you have before you in connection with your studies various S. D. Leidesdorf reports as they were prepared and produced and delivered to the defendant? A. I had various—I am sure I didn't have them all, but I have various Leidesdorf reports.

Q. How many did you have? A. I can't tell you exactly. I would say four or five.

Q. Did you notice that so far as the 20 major machine types are concerned, one of them was based on a 15-year life? A. That is correct.

Q. And one of them was based on a so-called Joel Dean's lives? A. That is correct.

Q. Those were lives that were recommended by Joel Dean at the time of the conclusion of the United Shoe case in Boston? A. Actually, I think one of them was based on

part Joel Dean's lives, and in eight cases on other [1472] lives.

Q. On 15 years? A. I have forgotten exactly, without looking at the document.

Q. Did you see any Leidesdorf reports dealing with the 38 minor machines? A. I saw them. They came along later, as I recall.

Q. Did you make any studies on those reports? A. I studied those reports but I have not made any tabulations on those reports.

* * *

[1501] Q. Now, do I understand your testimony correctly, Doctor, that your criticisms of the Leidesdorf approach—and I think you said it applied to all of the reports that were brought to your attention—were aside from your quarrel with the consumer's price index that the Leidesdorf calculations didn't provide for capital cost, as you called it, didn't take account of the future worth of investment, and didn't allow for taxes, is that correct? [1502] A. That is correct.

Q. Are those the only criticisms you have of the Leidesdorf approach, if I may so use the phrase? A. Those are the significant ones. I have made the criticism of the use of the index.

Q. I mentioned that. A. Those are——

Q. Otherwise the approach you would not quarrel with, is that correct? A. Well, it seems to me those are adequate to damn the approach.

Q. Whether they are adequate or not, Doctor, will you please try to answer the question I put to you? A. I will gladly do my best, Mr. Hayes.

Q. Aside from those objections, you have no quarrel with the Leidesdorf approach? A. I am not willing to

state that I have no quarrel with it. I think that it is—the assumptions are so incomplete that I am not willing to say I have no quarrel with it. It is a useless exercise.

Q. By the assumptions being incomplete, you are referring to the very four items I mentioned, [1503] aren't you? A. That's correct.

Q. Now, aside from that incompleteness to which you refer, have you any quarrel with the method used in the Leidesdorf calculations? A. Well, it is simply a mathematical exercise after that and I have no quarrel with the mathematics in those computations.

Q. Well, let's see if we can get to something more than mathematical, Doctor. Would you have any quarrel in determining whether or not damage had been sustained in taking a 1955 price and applying a proper index, whatever it is, to arrive at a '39 price? A. I think it's an artificial look, but I suppose in this proceeding it is an essential.

[1504] Q. Assuming a proper index, do you see anything improper in deducting from the cost thus arrived at the salvage value at the end of the useful life in order to arrive at the real cost? A. If in the deduction of that salvage value some recognition is taken of, A, depreciation and, B, capital gains, no.

Q. Those are again the things that you talked about? A. Yes.

Q. And do you see anything wrong in comparing the rents and royalties actually paid that went out of pocket with what would have gone out of pocket if there had been ownership in order to arrive at a damage figure? A. If you have a fair comparison, which you don't in those computations.

Q. Because of the elements you mentioned? A. That's right.

Q. Aside from those elements, you have a quarrel with the Leidesdorf calculation? A. I made perfectly clear another one yesterday, which you have not mentioned.

Q. What was that? [1505] A. That is in the determination of the number of machines that actually were purchased and disposed of. The disposals is a mere arithmetical calculation; it is not in fact the number leased by Hanover and returned.

Q. You mean because of the assumption of the length of life did not actually jibe in with the actual shipments and deliveries? A. That is correct.

Q. Did you make two calculations to see which was more favorable to United? A. No. That was not my purpose.

Q. Do you know that if the actual shipments and returns had been used the damage figure would be higher? A. I would have to see the figures to accept that. I do not know.

Q. You don't know? A. No.

Q. That is the simple answer to the question, isn't it, Doctor? A. It is.

* * *

[1507] Q. Does there exist any known, recognized price index for shoe machinery? A. No.

Q. Thank you.

[1508] Do you have Defendant's Exhibit 52 before you? That is your Table VII. A. Yes, I have it.

Q. Let me ask you a preliminary question. I notice that on this particular exhibit, as distinct from, I think, all of the others, there is pasted on below the caption, and again about midway down, sheets, little slips, with typewriting on them. Do you see those? A. Yes.

Q. And the upper one refers to Leidesdorf's fourth computation. What is that? A. In Leidesdorf's letter of April 19, 1961, addressed to Donovan, Leisure, Newton & Irvine, "Gentlemen: In acordance with your request we have made a fourth computation."

Q. That is Exhibit 41? A. Yes.

Q. Did you prepare a tabulation similar to those offered yesterday with respect to the other Leidesdorf tabulations? A. I am trying to recall. I think we did with respect to the third computation but I don't have those computations. To the best of my knowledge, they [1509] reveal substantially the same picture and I thought it would be clearer to focus on one of these rather than on any other, but they—I think in answer to a question by Mr. Carson yesterday I made the point that regardless of the variation in assumption they do not overcome the three deficiencies I am trying to illustrate by these exhibits.

Q. The decision to use Plaintiff's Exhibit 41 was your decision, Doctor? A. It was my decision.

Q. Alone? A. Alone, yes.

Mr. Hayes: Do you have a copy of Exhibit 52, your Honor?

The Court: Yes.

Q. If you will look at Defendant's Exhibit 52, Dr. Corson, as I understand it there is here a comparison of what you set forth as the Leidesdorf figures taken from Plaintiff's Exhibit 41, and the figure arrived at by relating the economic costs of leasing, as you computed them, and the economic costs of ownership as you computed them, and showing, according to your computation, that there was an excess of costs of ownership over costs of leasing of $949,000? [1510] A. That is correct.

Q. Do you mean by that that as a consequence of leasing instead of owning Hanover has made a profit of $949,000? A. I would not use your words, but I would reach the same conclusion. I have not said that they made a profit; I have said it was more advantageous to Hanover to cease than to own.

Q. It is not a profit figure? A. I have not attempted to suggest that it was a profit figure.

Q. I know that. I want to know now whether you consider it a profit figure or not. Did Hanover make a profit of $949,000 by leasing instead of being able to buy the machines? A. I don't know what you mean by "making a profit" in this context, but I will say no, it did not.

Q. You know what a profit is? A. I have an idea what a profit is.

Q. That if you buy a watch for $5 and sell it for $10, you have a profit of $5? A. If you have not kept it an awfully long time and kept your $10 tied up.

Q. You still have a profit of $5. [1511] A. It would depend on how long you kept it and what rate you borrowed the money for the $10?

Q. I didn't borrow any money; I just bought a watch for $5, kept it 10 years and sold it for $10. Did I have a $5 profit? A. No.

Q. I did not, you say? A. No.

Q. Will you tell me what my profit was? A. I have no idea.

Q. But it wasn't $5?. A. That's right.

Q. I wouldn't have to report $5 on my income tax return as a profit? A. No, I shouldn't think so.

Q. You wouldn't think so? A. No.

Q. You are not a tax expert, too, are you? A. No.

The Court: We are getting into a far field, I suppose, to determine whether the watch was used

in business or whether it was personal and whether it was depreciated?

Mr. Carson: Whether it kept time. We [1512] are wasting it now.

Mr. Hayes: I guess every time I am on my feet you waste time, Mr. Carson.

Q. As I understand Defendant's Exhibit 52, and please correct me if I am wrong, and particularly the lower part, the calculation of economic costs of leasing and economic costs of ownership—those figures in those two lines and the differences shown represent a projection as of 1939, assuming in 1939 Hanover Shoe had all of the knowledge that is now available as of the end of 1955, and what the effect would be if it were to get a 14% return on the investment it made in 1939, is that correct? A. I wouldn't put it in those words, but you are substantially correct.

Q. Well, I didn't misunderstand you.

* * *

[1513] Q. Now, still referring to Exhibit 52, Dr. Corson, the largest single factor in bringing about this difference of $949,000 is the use of the 14% cost of capital that you talk about, is it not? A. I suspect it is a major factor. I don't know the relative weight of these.

Q. Now if a different percentage were used, the figures would differ, would they not? A. Yes.

Q. If you had used 10%, for example, ? I made a rough calculation, they would about balance, w uldn't they? A. I don't know that to be the case.

Q. You don't know. But it would be—if you use a 10% so-called cost of capital, the difference would be substantially affected toward a point of non-existence; is that correct? A. It certainly would differ.

Q. And if you use 6%, to go still further, and there would possibly be an excess of the so-called economic cost of leasing over the so-called economic cost of capital? A. This might be, I don't know it to be the case.

[1514] Q. I hope my arithmetic last night was accurate. It's a rough calculation.

Of ownership, I should have said. Mr. O'Malley reminds me that I said economic cost of capital. I should have said economic cost of ownership, to use the witness' phrase.

Now, you used 14%, and you told us yesterday why you used it with reference to Exhibit D-47, and that's your Table I, if you will look at it—do you have it in front of you? A. I think I would amend your statement to say that it's the whole of D-47, rather than just Table I.

Q. I am sorry, you are correct. Table I with an appendix to Table I and Table II? A. That's correct.

Q. Now, in Table I, you arrive at a cost of capital which I think you stated averaged out to 22.14%, weighted out, is that correct? A. That is correct.

Q. And on Table II, which is the third page, you arrived at a cost of capital which I believe you said averaged 14.1%? A. That is correct. I think it was—yes, [1515] 14.1 I think is correct.

Q. Now this Table I, you arrived at this so-called cost of capital, and if I recall your testimony it was to the effect, that in each of these years, '40 through '51—not each of them but in the seven or eight years set forth there, Hanover sold varying quantities of stock to, I believe you said—yes, it's headed, "Members of the Corporate Family." Who are the members of the corporate family? A. I explained in making that statement yesterday that the ownership of Hanover Shoe, Inc., prior to 1956, was closely held and that the ownership was in the hands, I understand, of those who

were simultaneously serving as corporate officials, and this was all the meaning I had in mind by the use of the term the "corporate family."

Q. You mean the existing owners of the stock of the corporation? A. That is right.

Q. Would your evaluation of the cost of capital on Table I be changed if you were to be told that in each of the years substantial quantities of those sales were to employees? A. It would not change my opinion at all.

[1516] Q. They would not be existing stockholders prior to the purchases? A. The price at which it was sold would have been determined by the board of directors, regardless of whether it was sold, in addition to those who served on that board, to employees.

Q. In, for example, the year 1948, which is the highest percentage you showed for a sale of 5536 shares, if all of those shares were sold to employees of the company—pardon me, if 4200 of those shares were sold to employees of the company; not related to any of the existing stockholders, would you still maintain that the cost of capital for that year was 54.5%? A. Assuredly.

Q. Assuredly. I thought you would, Doctor. It doesn't occur to you as a possibility that Hanover might have been desirous of selling stock to key employees at low cost to them? A. It hadn't occurred to me, no.

Q. Is it a possibility that you might recognize; is it something that's done fairly frequently in corporations? A. It could be.

[1517] Q. And that would not represent the true cost of capital then, would it? A. I would think it represented the true cost of capital.

Q. Even though the motives the management had was to insure that employees stayed with it rather than to get a particular price for the stock? A. That is correct.

Q. Now you take these and you average them as I mentioned.

Now, let's turn to Table II. Table II, you arrive at a rate of return. You arrive at that by dividing the net profit after tax by the stockholders' equity. Now the rate of return you say is cost of capital; am I correct? A. I think I said that it is another indication of the cost of capital, and you will recall that I stated that the cost of capital for Hanover as a range from 14 to 22, I have consistently used the lowest of those figures.

Q. The lowest permissible cost of capital by your standard was 14%? A. That is my testimony.

Q. And in the year 1947, on Table II, Hanover [1518] had the largest profit in its history, did it not? A. That is correct.

Q. It was almost a 33% return on the investment? A. That is correct.

Q. And therefore, you say the capital cost 33% for that year? A. This is a factor to be taken into account.

Q. There were, of course, no public sales of Hanover stock to which you could refer to see what the market would be paying for it, were there? A. There were not.

Q. And isn't it a common practice in determining cost of capital among economists to look toward the market behavior, what does the market pay for the stock? A. That is correct.

Q. You have no opinion, I take it, Doctor, as to what the market would have paid for Hanover stock in 1947, if it were freely traded? A. I ventured no opinion.

Q. You are just taking Hanover's figures? A. That is correct.

Q. Would your view as to this so-called indication of cost of capital, if I were to tell you there [1519] was an

agreement among the stockholders of Hanover that they would sell only among themselves or to the corporation and that the price at which they would sell would at all times be the book value except that inventory would be valued at 85% of the book value. A. It would not change my opinion, but it would lend a special credence to Table I.

Q. A special credence, you mean Table I becomes even stronger in your opinion? A. In my opinion it does.

Q. Even though each year the net worth of Hanover increased? A. That is correct.

Q. Now, I think you told us before the recess that Exhibit 52, which is your summary sheet, was in the nature really of a forecast that was being made, possessed of all the facts that you had down to 1955? A. Well, the word "forecast" was your statement. I wouldn't particularly use that term. I have attempted to put together in retrospect, as I emphasized on yesterday, what data there is.

Q. But it would be—it's in the form of what would be forecast if in 1939 Hanover attended [1520] Dr. Corson and asked him if they should buy or sell and you, of course, had all the facts down to 1955? A. It is the kind of analysis I would make.

Q. At that time? A. At that time.

Q. Now, the closest year of Table I, to 1939, was 1940, where you show indication of cost of capital of 7.8%, and since Hanover was faced with the necessity, under assumptions of making the purchase in 1939, why did you not use 7.8%? A. In the first place, there are two reasons, one is that in 1939, if as you are suggesting, this analysis were to have been made, one would have taken into account the costs of capital in the years preceding that period, rather than in the year succeeding it; secondly that capital that is involved here was capital that was employed not just in the

year 1939; it was employed in each of the years through '55. As a consequence, it seems to me that the appropriate figure to take into account is the best approximation one can arrive at as to the cost of capital throughout this period, rather than in the particular year. [1521] Q. If in 1939 you had been retained by the Hanover management and you had Table I—you would not have 1940—you would not have the knowledge as to what happened in the future and would you not take the then current cost of capital? A. If I were really thinking about it, assuredly not, and it would seem to me that it would be essential that any businessman, as well as any economist, and particularly in the year 1939, with the outbreak of war—one would take into account not only what had immediately been past but what was expected.

You are making a decision in the purchase of whether it be a building or shoe machinery—as to what the return and what the expenses are going to be over a time in the future.

Q. If in 1939 again you retain—and now I refer to Table II—your indication of cost of capital, which I think is your phrase, for 1939 was 7.7 per cent, and in 1940 it was 7.94 per cent—if at that time without the knowledge of what the future holds you were making a similar calculation, would you not use these percentages? A. I would not.

[1522] Q. Why not? A. For the same reason I have just stated.

Q. Even if you were deprived of the knowledge of what was going to happen in the years subsequent to 1940? A. That is correct. My experience as a consultant would suggest that I woudn't be retained often if I had made such a prognostication.

Q. What you have done here is taken a 16-year period, arrived at the rate of return without knowledge as to how

much the market would have paid for Hanover stock, found a 14 per cent average and said, "That is the figure I shall use"? Isn't that what you have done? A. Yes, but may I add a word of explanation?

Q. Add anything you please, Doctor. A. I place a special credence, as I tried to make out yesterday, in the fact that in Table I you have essentially the price that Hanover's corporate officials who were simultaneously stockholders were charging the corporation for additional capital they supplied at each of these successive plans. This is the closest approximation to the market for this stock of this company.

[1523] Q. I tried to make clear to you that in each of these years the bulk of the sales were not to corporate officials who were stockholders; they were to employees.

I think you agreed that corporations do at times sell stock below the real value in order to keep key employees in their employ? A. Is that a question? May I respond to it?

Q. Certainly. A. They were charging this price to those employees or to whoever else bought that stock. That is the only concern I have here: What was the cost of the capital that they obtained.

Q. It was a bargain price in each instance, wasn't it? A. I thought earlier you were suggesting that 14 per cent was relatively high, that if I had used a lower figure—if it is a bargain price, it averages 22 per cent.

Q. Wasn't it a bargain price? A. By your terms. It is your suggestion that it is a bargain price and I do not know those facts so I can't deny it.

Q. Well, for example, in 1948, according to [1524] Table I, the stock was sold at $26.33 a share and if you look at your Table III for that year, you found that the profit—that there was [illegible]8 per cent return that year.

Mr. Carson: You mean Table II?
Mr. Hayes: Table II. I am sorry.

Q. There was a 28 per cent return that year, or more than one-quarter of the investment for the company with the stability of Hanover. Would you not say that was a bargain price? A. That sounds like a good price.

Q. It certainly does. You referred several times yesterday to the Anthony and Dean books and to the tabulations they made. When they in 1954 were preparing the tabulations and their estimates, both of them used, in order to determine a cost of capital for the industry, the available market figures of corporations where there was stock publicly outstanding, isn't that right? A. That is correct.

Q. Isn't that the usual approach? A. Wherever such is available.

Q. And where it is not available what is the usual approach? [1525] A. I think I have here used what is the usual approach.

Q. Isn't the usual approach to get the most similar companies one can get and find out how the market has treated them? A. It is an approach but it is subject to very considerable difficulty. You would have me justify each individual company that I would claim was comparable if I were to have used such an approach and it would be very difficult to do.

Q. Let me ask you another thing: Is it your testimony that the lowest cost of capital here is 14 per cent? A. In the light of these figures, this seems to me to be the best approximation one can make of the lowest cost of capital.

Q. Would you agree that a dozen different economists could treat with the same statistical data and come up with a dozen different answers? A. No.

Q. You would not? A. No.

Q. I read to you from a work by Joel Dean, and that is the same Professor Dean, called "Managerial [1526] Economics," published by Prentice-Hall.

At page 576, Professor Dean says—are you acquainted with this book? A. Yes, I know that book.

Q. "Cost of debt capital raises future important problems since bond prices depend on a fairly narrow range of factors and are dominated by the government bond markets. As a result, estimates of debt cost can be made highly precise in comparison to the uncertainties of estimating cost of equity capital and when debt and equity are combined to find the total cost of capital errors in interest cost estimates are negligible. The cost of equity capital is a much more tenuous quantity as the behavior of the stock market demonstrates. The basic difficulty is that stock prices are mere speculation about the future and depends on factors that have no statistical gauge. An estimate of the cost of equity capital based on statistical analysis thus relies on broad assumptions of the relevance of measurable current and historical data to market expectations. Estimates of cost of capital can frequently be made more economically by following market behavior directly instead of by analysis of such controlling factors and gross trends, [1527] sales volatility and so forth. Thus for an established company whose stock is well known and heavily traded the practical problem is to forecast what the stock will sell for at the time the new issue is to be floated. Such a projection is often based on recent market value of the stock, and the new issue will not alter the investment character of the stock, and then for companies whose stock has no active market or no market at all, market values may be estimates by statistical analysis of comparable companies."

There is no suggestion there, is there, of using the statistics of the company itself to arrive at its cost of capital? A. No, but that is an excellent statement in support of the reasoning I have advanced in this case. It is the most helpful statement I could ask for.

Q. I am directing myself strictly to your use of Hanover's figures. A. Precisely. In this instance——

Q. Instead of going to find comparable companies, and you agree that Professor Dean does not suggest that the cost of capital of a closely-held company be estimated by analysis of its own figures, [1528] does he? A. That is an inexact and inaccurate interpretation of the words you have just read.

Q. All right, you point out the inexactness and the inaccuracy, Doctor?

Mr. Carson: Would you let him see the language?

Mr. Hayes: Oh, certainly. If he can find anything in the book to support his use of Hanover's figures alone, I would be happy to see it.

A. "Estimates of cost of capital can frequently be made more economically by following market behavior directly instead of by analysis of such controlling factors as gross trends, sales volatility and so forth."

There is no use of any such data in this instance.

Secondly, ". . . for companies whose stock has no active market or no market at all, market values may be estimates by statistical analysis of comparable companies," if that need be done. I am adding "if that need be done."

Q. That is not in Dr. Dean's book? A. It is not. In this instance, as has been [1529] repeatedly stated, this is a re-

trospective look at what was the case. There is no need to forecast in 1939 what would have been the case.

We are here dealing, as the Leidesdorf computations deal, as the assumption prepared by your firm deal, with what we assume to be the case. I am making no assumption in this instance; I am taking the figures that Hanover has supplied and in this instance we have as a basis for determining a cost of capital reliable data rather than any sheer estimate of comparable companies or of Hanover's own situation.

Q. Is that your answer? A. Joel Dean, I suspect, confronted with the same situation, would have followed the same approach.

Q. That is your answer? A. That is my answer.

Q. If I recall rightly, I gave you an instance of a dozen different economists and you said they wouldn't come up with different answers? A. In this situation.

Q. I read you from Bierman & Smidt, which you referred to yesterday, at page 139. This is under the relevance of cost of capital. You have the book before you

[1530] "A person who desires neat solutions with one correct answer should avoid the computation of a corporation's cost of capital. Usually such an answer is impossible. If ten 'experts' independently computed the cost of capital of the IBM Corporation there would be ten answers."

What is your comment on that? A. Well, simply that I don't agree. I recognize, as my testimony should make clear, that the estimation of the cost of capital is assuredly no exact science and in suggesting a range of from 14 to 22 per cent, I surely made that explicit and in using the most conservative of those figures in all of my calculations

I hope I underlined that fact. I think that these authors overstate the point a bit, but only a bit.

Q. You are somewhat in disagreement with Bierman & Smidt on that point at least? A. Yes.

Q. That is the authority you supplied us? A. That is correct.

[1531] Q. And this is the authority you supplied us? A. Yes.

Q. You do take the position, and you do take the position in this case, however, that Hanover's cost of capital must be calculated at not less than 14%; is that correct? A. That is my opinion.

Q. Now I go on in Bierman's book to the following page:

> "The satisfactory definition of cost of capital is necessary in guiding the internal investment policies of corporate management. The choice of investments represents a strategic decision for the management of a firm since in large part the choices made now will influence the future course of the firm's development. It is not surprising to find that implicit in any decision of a cost of capital to guide investment policies, is a judgment as to the goals toward which the firm is or should be striving. The goals determine the appropriate definition of capital cost. Certainly, we cannot assume without proof that seemingly different goals will lead to identical definitions of [1532] cost of capital."

What is your comment on that statement, Doctor? A. I have no comment on it.

Q. Well, let me ask you a question then referring to Exhibit 47, Table I. Do you know what the corporate goals

were of management when they sold the stock at those prices? A. I do not, but I do know that this statement applies again to a prospective look forward which is the businessman's usual situation, and in these proceedings, we are not concerned with a prospective look forward in which we must take into account whatever the goals may be; we are concerned with a retrospective look that looks back without regard to whatever the goals may have been, and yet puts together such evidence as is available as to what was the case.

Q. Have you finished? A. I have.

Q. My question was directed to Table 47—pardon me, Table I, in Exhibit 47.

Is it not a fact that in each of the years when Hanover sold stock to these employees, it was taking a prospective look? [1533] A. This may be the case. You have supplied the facts that I know nothing of that they sold stock to employees. You are supplying the fact that this was the motive. I do not know this to be the case. I regard it as irrelevant to this table if it were.

Q. Assume it is a fact, Doctor, and that the corporate goal was to maintain these people in their employment, was not Hanover each time it sold stock to them taking a prospective look? A. This may be the case.

Q. And if that be so, one could form different judgments with respect to the cost of capital prospectively, that you have set forth on Exhibit 47, could not one? A. One could not.

Q. One could not.

The Court: At this point, Mr. Hayes, are you going to put in evidence the agreement you referred to?

Mr. Hayes: Yes, I am. I could put it in right now.

* * *

[1534] Q. Assuming, Doctor, that Hanover in fact had an established market for the stock throughout this period, and the corporation sold to key employees directly at say half the market price; how would you treat that in determining the cost of capital? A. In determining the cost of capital, when one has advantage of looking back over the 16 years, [1535] I can only be guided by what it was.

Q. Now, will you answer the question. A. The answer to the question should be clear from those words.

Q. I am afraid it is not clear to me, Doctor. I told you yesterday I am on the dull side. A. Would you restate the question for me, please?

Mr. Hayes: Would you read it, please.

(Question read.)

A. In determining the cost of capital in this case I would not take that into account.

The Court: I understand what you mean by that is that it doesn't make any difference what the stock was worth, the people paid so much for it?

The Witness: That is precisely what I am saying.

Q. Now, this 14% which you have treated as the cost of capital, let me see if I get your reasoning, Doctor. Are you saying in substance, since you used Table II in Exhibit 47, that Hanover on any investment had to make 14%; if it didn't, it was not a good investment? A. That would be my judgment.

[1536] Q. That is the substance of it. A. That is my judgment.

Q. They are sort of under an obligation to itself to earn 14%? A. The capital having cost them 14% it would seem to me to be an unwise business judgment——

Q. When you say "cost" just what do you mean, Doctor? It is not "cost" in the sense they have paid out money, is it? A. It's cost in the sense that they paid out money, if you look at Table I.

Q. Who paid out money there, the stockholders, didn't they? A. Yes, and the earnings that they expected on that return, on that money, remitted the cost.

Q. Now, I am talking about the word "cost" as you use it. You don't mean the word "expense," do you? A. I mean an economic cost.

Q. You don't mean "cost" in an accounting sense that would enter into the profit and loss statement? A. Not an out-of-pocket expenditure.

Q. That's right. This is an economic concept, [1537] is it not? A. It is.

Q. And it would never enter into the profit and loss statement of a company, would it? A. In the long run, of course, it does.

Q. I am talking about the profit and loss statement currently. A. In any individual year one might find difficulty over a year.

Q. Now, do the costs of capital vary with the differing goals a corporation may have? A. Oh, yes. I wouldn't quarrel with that.

Q. And if the goal of Hanover was to keep these employees in its employ by giving them stock at bargain rates, why shouldn't the cost of capital—of the whole outstanding stock—be determined by the bargain rate given to an em-

ployee? A. It would seem to me that again all I can answer to this hypothetical question is that I am dealing only with what the records indicate the cost of capital was. Taking into account all the goals of this company, and having the advantage of looking back over 16 years, I have simply tried to reproduce here what data there is to reflect what [1538] the cost was, and in that sense, it reflects whatever goals were employed in the decisions made.

Q. Now, the approach in this case, as you have undoubtedly been advised, is that Hanover claims it was damaged by not being permitted to buy the lease-only machines in 1939. You have been told that? A. I have been told that.

Q. And that Leidesdorf calculations were put in as evidence of the extent of that damage; you have been told that, have you not? A. I have been told that, yes.

Q. Now, in 1939, Hanover did not and could not know at what prices its own stock would be sold to its employees in later years, could it? A. No.

Q. And Hanover did not and could not know how much it would make on every dollar of invested capital for the next 16 years, is that not correct? A. That is correct.

Q. So that so far as Hanover was concerned in 1939, assuming it had the ability to buy, it had to make its decision then, correct? A. That is correct.

Q. Without reference to the factors which [1539] came into being over a period of 16 subsequent years? A. Any businessman in making such a decision attempt to forecast over the time period for which the investment is involved, the conditions that will obtain.

Q. He doesn't know them, he is guessing at them, is he not, be it an intelligent guess or not? A. It can be a

very reliable guess in a well-managed company, as I assume Hanover was.

Q. You are not suggesting that in 1939 the management of Hanover knew all the figures that are set forth in your tabulations, or could know them? A. I am not.

Q. I didn't think you were suggesting that, Doctor.

Now, did there come a time, to your knowledge, when some Hanover stock was sold to the public? A. I believe that was the case in 1956.

Q. I am sorry? A. A point beyond the period covered here.

Q. That's right. Were you acquainted with the facts of that public issue? A. I was at one time. I frankly don't recall them at the moment.

[1540] Q. Have you seen the prospectus? A. I don't believe I ever saw the prospectus.

Q. Do you know at what price the stock was sold? A. I did at one time, but I do not recall, to be truthful.

Q. I show you Defendant's Exhibit 1 for identification, "Prospectus" for a secondary issue of 150,000 shares out of 600,000, I believe, which were then issued, a sale by stockholders not by Hanover, and it shows that the sales price the public paid was $25, and the earnings per share were $2.09. Do you see the price per share on the front page, and the earning tabulation is down here, earnings per share. That's about 12 times earnings, roughly, is it not? A. Yes.

Q. Or roughly 8%? A. Yes.

Q. And that was—would you say that was Hanover's cost of capital in 1956, then? A. In the sale of this particular block of stock, but assuredly not the cost of capital as I have defined it.

[1541] Q. If 1956 were included in this damage period would you have included that secondary issue, Doctor? A. Yes.

Q. You would. And you would have included it as the index to the cost of capital, would you not? A. That's right.

Q. Now, actually that was a minority interest, the rest of the stock being closely held. Does the market ordinarily discount stock, a secondary issue, when the majority is held by a small close group? A. I didn't know this was a minority holding, and my answers to your earlier questions would be modified accordingly. They do normally discount the price of a minority holding.

Q. So that if this were a straight issue without having a whole group controlling the company the public could be expected to pay a higher price for the stock; is that correct? A. Now, if I follow your question correctly and perhaps I misunderstand it, I would say it's not correct, but if you would have it read back——

Mr. Hayes: Would you read the question, please?

[1542] (Question read.)

A. If I understand your question, the answer is no, it is not correct.

Q. I thought you said that in the case of a sale of a minority block with a small group controlling the majority, the market is inclined to discount the price? A. That is correct.

Q. Doesn't it necessarily follow, then, that if there were not—if it were not a minority interest, and if there were not a small group controlling the company, the public price could be higher? A. I would expect it to be.

Q. That's right. But, at any rate, it was 12 times, or 8% in 1956? A. That is correct.

Q. And you knew about this, Doctor, and you paid it no consideration because you say it was beyond the damage period? A. That is correct.

Q. Although it was the only instance in the whole history of Hanover where there had been a public issue of stock? A. Had I taken it into account, and this is [1543] my reasoning, I would be subject to the same criticism that you make with respect to taking into account the figures for the whole 16-year period rather than those for the year 1940.

Mr. Hayes: May I have the question, please?

(Question read.)

Q. And that's your answer, Doctor? A. That is my answer.

Q. Now let me continue a bit, if I may, with this 14% I think you testified in substance—I hope I don't improperly phrase what you said, that the use of the 14% was on the assumption that that is what Hanover had to earn? A. That is correct.

Q. And if it didn't, it suffered what you call an economic loss? A. That is correct.

Q. Are you there indulging an assumption, and I don't use the word improperly at all, Doctor, which might be phrased in this fashion: That as against the purchase of machinery in 1939, if Hanover had available to it other opportunities where it would earn 14% and should have turned down the purchase of machinery, and embraced the other opportunities? [1544] A. If they had earned a greater return than the purchase of machinery that would be the logical consequence.

Q. That is the substance of the position, isn't it? A. Yes.

Q. Now, what is your knowledge as to what investment opportunities there were open for Hanover as alternatives to the purchase of machinery in 1939? A. I have no knowledge.

Q. And you don't know whether they would have made out better or not if you were looking at it in 1939, do you? A. I do not.

Q. Suppose in somewhere along this period, 1939, 1940, anywhere—let me ask a preliminary question first. I want to be sure that I have this straight.

Is your position that this 14% so-called cost of capital obtained throughout the period, taking it on an average? A. On an average this is the losses, and remember I have testified that as I see it, these figures indicate that the cost of capital could be [1545] estimated at from 14 to 20%.

Q. I know, I am taking a minimum. A. I am taking the minimum of that range.

Q. I am going along with you on a minimum because your tables are based on this 14%, Doctor. You decided which percentage to use, and I am going along with you. And I think you testified in response to a question by Mr. Carson yesterday, that if Hanover could borrow money at, let's say, 2%, and did, that that would not reduce the cost of capital, that would add to it because it had to pay out interest. A. Particularly—and this is essential to the answer, particularly if this was over and above the capital they already had, whateyer it were being used in.

Q. Over and above the capital. I am sorry, I don't follow this, Doctor. We know what their capital was at all times. I am not thinking of additional capital. A. Well——

Q. Didn't you testify in response to Mr. Carson yesterday, and I may have it wrong, that borrowing money—and I am assuming 2%, I forgot what percentage he used—would only add to the cost [1546] of capital, they still had this 14% cost of capital, and the interest would be an additional charge; didn't you so testify yesterday? A. If they had $1 million in capital in the company at this time, and the average cost of that capital was 14% or let's say $140,000——

Q. Right. A. —then if they borrowed another $100,000 at 2%, the cost would be in addition to that $140,000.

Q. That's what I thought you said.

Now, suppose Hanover had an opportunity to make an investment which would give it, let us say, a 10% return, an investment, let's say, in some other company, and Hanover would be able to borrow the money. Let's assume the investment was $500,000, and they borrowed the $500,000 from banks, and paid it back over a period of years out of their earnings. They paid 2% on the borrowing. Is it your testimony that they would suffer an economic loss? A. Yes.

Q. Actually, they would be making a profit, wouldn't they? A. In the Hanover case it was particularly true that they would have suffered an economic loss.

[1547] Q. But they would be making a profit, in fact, so far as Uncle Sam is concerned, wouldn't they? A. Yes, this is conceivable.

Q. So that your economic loss and your actual profit and loss are not the same, are they, Doctor? A. Well, assuredly, they are not.

Q. And I take it that in the case I supposed and gave you, you would advise Hanover against making that investment? A. I would advise them against making an invest-

ment in which they were employing capital that cost them 14% and in which they were obtaining a return of 10%.

Q. Although the capital they invested they borrowed for 2%? A. In the Hanover case, of course, as has been made clear, they had capital at all times for which they were paying 14%, so that the situation you assume is utterly unrealistic to the proceeding in which we are engaged.

Q. I see. I am sorry I am so unrealistic, Doctor, but to pursue it a bit more: the capital would remain unchanged in the assumption I gave it, they would still be employing it in their business, [1548] but they borrowed $500,000 at 2%, they got the money, they turned it into an investment, the investment paid them 10% a year, they paid out 2% a year, and you say they are suffering a loss? A. Yes. May I try to make it clear to you?

Q. I wish you would, because, frankly, it is not clear to me, Doctor.

The Court: I'd like to hear this but I'd like to say that I am very much confused and interested in this phase of it as to what the cost of capital is, and so go ahead and give any explanation you want, Doctor.

A. My explanation is this: Here was a company that had capital in the business, it was not using that capital efficiently during a large portion of this period, as has been pointed out, it was allowing a goodly portion of this capital to remain idle and relatively unutilized. If one studies the current ratio of current assets to current liabilities, one finds that the ratio in this company over much of this period was quite high.

Not that it was small, they had plenty. Now, to assume that one would go out and borrow additional capital at

whatever the rate, and add that [1549] additional amount of out-of-pocket cost, which would appear on the profit and loss statement, is only to say that they would have had additional costs for capital. The capital that was in there, for which they had ample to buy the machines that were available most of this time, had cost them 14%, and as a consequence, any additional cost that was incurred, as a bank borrowing or what not, to my mind would add to that cost, would not reduce the cost of that capital that was being employed in these machines.

Do I make myself clear?

The Court: I think I understand it now.

Q. I understood the words you used, Doctor. It was clear enough. But there is another problem to me. What you are saying—in the first part of your answer or explanation, was that they had a lot of unused capital around, they didn't need all this capital. But this was a management decision, was it not? A. Yes.

Q. And even today, directors are still supposed to direct a company, are they not? A. This is right, sure.

Q. And they were in 1939? [1550] A. Surely.

Q. And are you now substituting your judgment as to how they should have managed the company for the judgment of the directors? A. No.

Q. That's what it sounded like to me because you said it would be unrealistic, I think was your word, with all this capital lying around for them to go out and borrow money. In the assumption I gave you, they did go out and borrow it. This was their decision, whether it was wise or unwise. Did they make a profit? A. I am not substituting my judgment for the managerial decision; I am substituting my judgment for your judgment. I think it would have been a very unwise managerial decision to have made,

and if it had, it would have added to the total out-of-pocket expenditures in that year.

[1551] Q. It would have added to the total out-of-pocket expenditures. Do you mean that they would have paid this 2% on the $100,000? A. Yes.

Q. What about the $50,000 they would collect? That would be the in-pocket. A. They could have made the same $50,000 with the money they already had in the bank.

Q. Maybe they could, maybe it is unwise, but suppose they did it? I want to find out what the cost to them was. A. I thought I had made that clear.

Q. Are you sticking to your 14% plus interest? A. Yes.

Q. The 14% was not out-of-pocket for Hanover, was it? A. A portion was and a portion was not.

Q. Please explain that. A. That portion that was paid out in dividends each year was an out-of-pocket expenditure.

Q. So now our cost of capital is divided into what is paid out of dividends and what is retained in the company and in the net earnings and added together? [1552] A. Isn't that perfectly clear from Tables I and II?

Q. Maybe it is. I told you I am not an economist. That is why I solicit your patience, as I did yesterday. I find these concepts extremely difficult. Actually there was no cost in the real sense of the term of out-of-pocket expenditure deductible on the tax return of 14%, was there? A. No.

Q. None at all? A. No.

Q. And in no year did any item representing that 14% or any portion of it appear on the tax return? A. No. It appeared on the records of sales of common stock, in each instance.

* * *

[1553] Q. Just before the recess, Dr. Corson, we were discussing the case about Hanover owing money.

In the course of our discussion you mentioned the highly liquid condition of the Hanover Company over the years, the strong cash position, and so on.

Suppose Hanover at any point during this period without borrowing invested $500,000 of its surplus funds in anything, X, and received a 10 per cent return on its investment, $50,000 a year; do I understand your testimony to be that they would suffer a 4 per cent economic loss? A. They would have had a better utilization of the capital they had, but they would not have utilized it at a return commensurate with what it was costing them. To that extent, yes, they would have suffered a loss on that additional investment.

Q. Even though they were not using the funds [1554] for anything else? A. Yes.

Q. Actually, as far as Uncle Sam is concerned, they would be making $50,000 a year of income, wouldn't they?

Mr. Carson: Objection. I don't know what this "so far as Uncle Sam" refers to. Is this income tax?

The Court: You better rephrase your question.

Mr. Hayes: I thought the witness used "Uncle Sam" and I was adopting his terminology.

Q. So far as the liability to pay taxes might be concerned, they would be reporting $50,000 additional income each year? A. Assuming that the circumstances you described were the case.

Q. And these are funds that they were not otherwise utilizing, we will assume that? A. If that is the case.

Q. But by your approach they would be suffering a 4 per cent economic loss? A. That is correct.

Q. That would not be an actual loss? [1555] A. In the long run it would be a real loss.

Q. It wouldn't be a dollar and cents loss in any one year? A. In the long run it would.

Q. Would you please explain that? A. There is a limit to how many times one can invest capital that cost 14 per cent and get a return of only 10 per cent. As long as one had additional capital that was not being utilized and was earning nothing, yes, this would have been the case, but if one continues this in the long run this is a net loss.

Q. And if they continue to make throughout the years, aside from this investment, 14 per cent return, exclusive of the investment, so that their capital would still remain a cost of 14 per cent, and on this investment they would make only 10 per cent, you say there would come a time when they would exhaust their capital? A. Let me put it more precisely: Over the years there would be reflected a gradual reduction in the rate of earnings on the stockholders' equity and in that sense there would be a loss, and in no other sense.

Q. So that the rate of return would go down [1556] overall? A. The rate of return on the stockholders' equity would go down by virtue of an unprofitable or an uneconomic investment.

Q. You didn't mean "unprofitable"? You changed that to "uneconomic"? A. Yes.

Q. Let's suppose it brought it down to a 13 per cent return overall, then their cost of capital becomes 13 per cent? A. Their cost of capital was not measured by that alone and the 14 per cent figure was not measured by that alone.

Q. I understand that. I am assuming over the years that as a result of this investment on which they got 10 per

cent their return equity overall became 13 instead of 14 and that would mean their cost of capital, as a consequence, would be 13 per cent instead of 14 per cent? A. It would not.

Q. Wouldn't it? A. No.

Q. Why wouldn't it? A. You said you understood it and I thought [1557] your question made clear that you didn't. I have taken into account in Tables I and II not alone that factor to which you are now referring; I have taken into account, and particularly as I have tried to emphasize, the price that Hanover's corporate stockholders charged Hanover for the capital that they supplied.

This, to my mind, is a particularly relevant indication of what the cost of Hanover's capital was.

Q. Maybe I didn't make my question clear, Doctor. They had a 14 per cent, according to your assumption, cost of capital. Now if, during this period, they used the surplus funds on which overall they had a 14 per cent return, they used the surplus funds and on those surplus funds they made only 10 per cent, that would tend to depress, would it not, the total income? A. That is right.

Q. And let's assume now that it would depress it to the extent of 1 per cent, so that you had 13 per cent. Now, with that assumption, so that you could come up with a 13 per cent return, wouldn't that mean that 13 per cent is the cost of capital? A. I answered that question before, no. I [1558] repeat the no.

Q. You are referring now entirely to Table I? A. I have said that in arriving at an estimate of the cost of capital, in my estimate was the cost of capital ranged from 14 per cent to 22 per cent, that that was, the fact to which

you are alluding was one that I took into account, but I have said that the one to which I place especial credence is the one reflected in Table I.

Q. Which is the 22 percent? A. This is correct.

Q. But your tabulations are based on the 14 per cent, are they not? A. As I tried to make clear, I used the most conservative estimate.

Q. It is to that estimate that I am addressing the question; I am not addressing it to Table I. I am addressing it to your tabulations. Is that clear? A. Yes, that is clear.

Q. Fine. Now, that being clear, will you answer the question I put to you? Don't bring in Table I, please. I am talking about Table II, I think it is, and your calculations.

[1559] Mr. Carson: May we have the question so stated or read.

Mr. Hayes: I think it is easier for me to restate it, and it is faster.

Q. Talking about your 14 per cent cost of capital which is based on the earnings ratio, if Hanover used some of its surplus funds during the period and got a 10 per cent return, so that the overall return on that investment brought the overall return down to 13 per cent, would 13 per cent be the cost of capital on that basis? A. I cannot answer that alone and it is unreasonable to expect me to answer that separate from the conclusion in Table I. I have presented these as a piece. They are two bits of evidence which, to my mind, add up to a conclusion as to cost of capital, and I simply cannot reach a conclusion on the basis of one, and one alone, without regard to the other evidence.

Q. So your answer is you are incapable of answering that question? A. I like that verb, yes.

Q. Thank you. Now, I think you said this morning that this 14 per cent—I have forgotten the [1560] exact language, and I don't mean to misquote you and if I do, please correct me, which I am sure you will, but I think you said in substance this morning that this 14 per cent represents the opportunity rate. Didn't you say that in substance this morning? A. I don't think I said that this morning. I think yesterday I used that term in another connection. I think that in explaining why the cost of capital had to be taken into account, it is because the stockholders will not long supply funds which they could invest elsewhere in other opportunities if the rate goes to a point which is below alternative opportunities.

Q. Well, would it be correct to describe this 14 per cent cost of capital rate, which you used in your tabulations, as an opportunity rate? A. No, it would not.

Q. It would not. What is an opportunity rate as understood by economists? A. Well, the term opportunity cost is really a term applied to alternative opportunities. One evaluates in making an investment alternative opportunities, and if the alternative opportunities will yield more, then one chooses the alternative oppor- [1561] tunities, and as a consequence the opportunity cost is essentially that cost at which the investor will choose one or the other.

Q. Now, isn't that what you were doing retrospectively, prospectively in your tabulations, comparing two opportunities supposedly available to Hanover, one to buy and the other to lease? A. You must recall, of course, that I was doing in these tabulations only what the Leidesdorf computations afforded, and I was simply correcting them to make the complete picture of the economic costs. I wasn't making the choices as to whether these were alternative

opportunities that Hanover had. I was taking the Leidesdorf computations as my base.

Mr. Hayes: Would you mind repeating the question, please?

(Question read.)

A. I suppose those terms can be applied.

Q. That's an accurate and fair description, is it not, Doctor? A. Yes, I suppose so.

Q. Let's suppose it is, yes.

Now, applying that test, if Hanover made an investment which returned a 14 per cent, it would [1562] just be breaking even on its cost of capital, wouldn't it? A. That is correct.

Q. And if it made an investment which returned 15 per cent, by your use of the term "cost of capital," you would really be making 4 per cent, wouldn't it? A. It would be making an economically profitable investment.

Q. By 1 per cent? A. By 1 per cent.

Q. And if it made an investment which returned it 13 per cent, it would be suffering an economic loss? A. This is correct.

Q. Not a real loss, this is an economic concept? A. A real loss.

Q. A real loss? A. We are not dealing with theory, we are dealing with reality.

Q. This is money that would be out of Hanover's pocket? A. In the long run it would.

Q. Even though they were making 13 per cent they were losing money? [1563] A. In the long run, it would.

Q. How long is this run, Doctor? A. This depends entirely upon a sequence of actions within an individual company.

Q. Suppose it went on for fifteen years, investing surplus funds at 13 per cent? A. I would suspect over fifteen years the rate of earnings would hence have declined, as a consequence one would have expected that the per share value would have declined, surely the book value per share would logically have declined, and in these terms this is just as real a loss as any one, except for shortsighted business people.

Q. So that by making 13 per cent, assuming they don't pay it all out on dividends, their book value declines each year, does it? A. Relative to earnings.

Q. Even though it is a stronger coropration each year? A. The stronger is your adjective, not mine.

Q. It is a question I am asking you, Doctor. Isn't it stronger financially? A. I wouldn't think it was stronger if the rate of earnings persistently goes down.

[1564] Q. This loss you are talking about is again, to use your phrase, an economic loss, is it not? A. And a real loss.

Q. Is it damage they suffered? A. I don't know what you mean by the term "damage" in this context.

Q. You don't know what I mean by damage? Did you know what the Leidesdorf calculations were offered in this action to prove? A. Yes.

Q. To wit, that it cost Hanover more to lease than it would have cost it to buy.

Mr. Carson: Objected to as improper cross examination, the motive of counsel is no part of the witness's evidence.

The Court: He can answer. He asked him if he knew, and I think he said yes.

Q. Would this failure to make 13 per cent—I will withdraw that.

Now, let me ask you this question, Doctor. Go to your tabulations. You used 14 per cent. I am thinking particularly of Exhibit 52, where you compared the supposed economic costs of leasing with the supposed economic cost of ownership at 14 per cent. [1565] Suppose you had made that tabulation, if you will, at 9 per cent, and that 9 per cent, the economic cost of leasing would be greater than the economic cost of ownership.

Would you say that it would be economically sound then for Hanover to buy the machines rather than to lease them?

The Witness: Would you repeat the question, please?

(Question read.)

A. If the economic cost of leasing, if I follow this long question—if the economic cost of leasing were greater than the economic cost of ownership, then it seems clear that it would not be economic to continue to lease the machines if the alternative were available.

Q. If the alternative to purchase were available it would be economically sound to purchase? A. If I follow this question. I must admit difficulty in following this question.

Q. Maybe this question will help you. Still on the same assumption: Would it mean, following your tabulation, your type of tabulation in Exhibit 52, that if at 9 per cent the economic cost of ownership [1566] would be less than the economic cost of leasing, would that mean that on own-

ership Hanover would be making at least 10 per cent? A. I think the answer is yes, again, if I follow your question.

Q. I think it is, too. Now, suppose, Doctor, that back in 1939 you were retained by the Hanover management to advise it as to whether it should purchase these machines or not, and suppose, further, that you had the gift of foreknowledge and you knew all of the details through 1955 that are set forth in your charts, you would have advised Hanover not to buy, is that correct? A. If I had knowledge of all that happened, yes.

Q. That's right. And suppose the Hanover management said to you, "Sorry, Doctor. We're grateful for your advice, we are not going to accept it because it looks to us that for an investment of around $500,000 we can save rentals and royalties of a million, eight over the next sixteen years, we have the money to make the investment, we are going to improve our profit and loss statement"? Your judgment would be that they were making an unwise decision, would it not? [1567] A. If I then had the foresight that is reflected in these tables, I would hope that they would recognize that they were then making an unwise decision.

Q. Yes, by your standards. A. That is correct.

Q. Whose decision should control in a situation like that, the economic advisor or the management?

Mr. Carson: Objected to as irrelevant and not proper cross examination.

The Court: Yes, sustained.

Q. Isn't it a fact that management finds this concept of cost of capital that you have been telling rather a vague and difficult one, speaking generally? A. Well, the fact that I have been successful in twelve years of consulting suggested it has not been. It is my opinion that it has not been.

Q. That is true with respect to prospective judgment, is it not? A. In prospective decisions it is all the more difficult, and to use your adjective, I think it is the one you use, it is all the more vague.

Fortunately here, and as I said yesterday, this is one of the advantages, one of the few advantages [1567a] that we have, and here we look back retrospectively and we see many of the vague aspects smoothed out by the elapse of time.

[1568] The Court: Doctor, may I go back just a few questions.

Mr. Hayes asked you the question that if you had known all these facts from 1939 up until now and that for an investment of $500,000 Hanover could have purchased this machinery, and I think he asked you the question whether you would have advised Hanover to make the purchase and your answer was no. May I ask one further question. If Hanover gave you the choice or said to you, "We want to do one of two things: buy this machinery at $500,000 or continue our capital in the way we have been using it," which is not really using it, I guess, what would have been your advice to them?

The Witness: I would have said on the basis of these figures and at the cost of capital that you are better advised to continue the leasing but I would have assuredly advised them to try to find some way to pay out that capital so that they do not have it, or to find uses for it. I don't think I would have advised them to put it to a use which would seem to be a less economic one than the one that they then had as an alternative, the leasing. The solu-

tion for Hanover, in my opinion, in 1939 and 1940 was not to put unneeded [1569] capital to work at an uneconomic rate but to get rid of unneeded capital.

The Court: All right.

*By Mr. Hayes:*

Q. Suppose there were no other better opportunities available to it than the purchase of the machinery? A. If it had made a bad mistake in accumulating capital in this business that was not needed and was not paying it out, so that it wasn't bearing a burden that it did not economically need in this business, then you always have the advantage of paying it out to your stockholders and relieving yourself for the future of the burden of carrying unneeded resources.

Q. That disturbs me a little, Doctor. What would they do then a few years later if they needed that capital for some opportunity that did come along; issue some more stock to the same stockholders? A. That is precisely what they did do.

Q. No, it isn't. I am sorry to differ with you. A. In Table I it is suggested that they did sell additional stock in successive years when additional capital was needed.

Q. Do you see any indication on Table I or in any of your tabulations where Hanover first paid out dividends [1570] to its stockholders and then sold stock back to the same stockholders because of a later opportunity they didn't see at the time they paid the dividends? A. Table I does not deal with that problem and I don't think your question did.

Q. That was what your answer was. A. That was not my answer.

Q. I think the record will show what your answer was. So your solution would be if they couldn't get 14% they should declare dividends? A. My answer was that they should not. My answer to the Court was that it is not a wise business decision to simply, because you have excess cash, use it in an uneconomic way.

Q. That is what, in your opinion, is an uneconomic way, using 14%? A. I can only venture my opinion.

Q. Right. And if you are wrong on the 14% and it should be 6% that changes the whole picture? A. And if it should be 22% it would change it substantially.

Q. If it were 6% it would also change it, would it not? A. Correct.

[1571] Q. You would concede, would you not, that management has a prerogative in determining what should be paid out in dividends and what should be kept in the company? A. They certainly have that prerogative.

Q. You would not disagree with—by the way, you are the one who mentioned the Donaldson book yesterday? A. Yes.

Q. You would not disagree with the statement he makes on page 61, "It is really not surprising that management which has had a lifelong identification with a particular business finds the opportunity concept rather vague and unreal except as specific alternative investment opportunities actually exist for their consideration"? A. I have not thought about that statement, so I really don't have any opinion. I don't have, at first blush, any reason to object to it.

Q. It sounds like ordinary common sense, doesn't it, Doctor? A. Will you tell me where it is?

Q. Page 61. It is the part that I have marked with the pencil in the margin on page 61. A. I see. I would hardly

think it is applicable [1572] in this case. The statement says, "It is really not surprising that management which has had a lifelong identification with a particular business finds the opportunity concept rather vague."

Now you have been picturing quite precisely what the alternative opportunities were here and they were alternatives with which the management of this company had had a lifelong identification, leasing shoe machinery versus buying. If the assumptions in this proceeding are to hold, if the machinery were available for sale in 1939, this lifelong identification with the industry was in an industry in which these alternatives were not unknown to them then.

Q. The alternative of—— A. Leasing and buying.

Q. The alternative of buying was unknown to them, was it not? A. We are making, and the Leidesdorf computations make, the very artificial assumption that they were available for sale in 1939 and if they were available for sale and if the assumption is valid in one respect it is valid in this respect.

Q. So that is your answer? A. That is my answer.

[1573] Q. Thank you, Doctor. Do I understand your theory in substance to be this: that if an enterprise has an opportunity offered to it—its cost of capital, we will assume, is 14%—whereby it can make 20%, and another opportunity is offered to it whereby it can make 10%, and for reasons that management deems best it elects the 10%, that there is a real loss sustained by the business? A. I think I made clear that in the long run there is a loss sustained by the business that is reflected in a lower rate of earnings on stockholders' equity and is reflected in a lower per-share value relative to earnings.

Q. And that is your approach here? A. Yes.

Q. And you come out with a conclusion, on Exhibit 52, and I want to know if this is what you mean by Exhibit 52,

when you speak of excess of costs of ownership over costs of leasing of $949,000, that Hanover was not damaged in this case? A. I have developed this table to present just what I mean, that on the assumptions first stated in the Leidesdorf computations, if these were additional factors that any going enterprise would have to take into [1574] account, that then, between these alternatives of leasing and of owning, the cost of ownership would exceed the cost of leasing.

Q. And therefore there is no damage to Hanover as a consequence of its inability to act to buy the machines? A. I don't presume to know all the legal implications of the term "damage" as to be willing to use it. I have said precisely what the table means and I won't say anything more.

Q. You are not going to say that they made a profit, either, of $949,000? A. I hope I have made clear what is meant.

Q. So that these tabulations, in your mind at least, do not demonstrate that Hanover did not suffer damage?

Mr. Carson: Objected to as already answered.

The Court: I am going to sustain the objection. I think that is what this lawsuit is: whether it suffered damage, and I do believe that the doctor is correct, that involves many more things than these tables.

Mr. Hayes: I submit this is a perfectly proper question, your Honor.

The Court: As to whether Hanover suffered [1575] damages?

Mr. Hayes: Whether his tabulations in his mind indicated that Hanover suffered no damage, if that is what he is seeking to prove by these tabulations.

The Court: I think your question was based on the entire case and not on the tables.

Mr. Carson: That is irrelevant and the tabulation speaks for itself.

The Court: I sustain the objection. If you want to reframe your question, you may.

Mr. Hayes: I would like to press it, your Honor, and I don't want to seem stubborn——

The Court: No. Try it again.

Q. Were your tabulations prepared for the purpose and with the intent of attempting to demonstrate that Hanover sustained no damage because of its inability to lease the twenty machines which you considered in your tabulation?

Mr. Carson: The same objection.

The Court: Yes. Sustained. I think that is an improper question. I think it is quite clear that he has taken these Leidesdorf reports which have certain assumptions and maybe he would not make those assumptions and he has corrected them where he thought they should be [1576] corrected and he has arrived at a dollar result, which is obvious, as I see it.

Q. Look, if you will, please, Doctor, at Exhibit 48, your Table III. Do you have it before you, Doctor? A. I do.

Q. The figure at the extreme right, under the Total column, of two million, two hundred forty-seven thousand-odd dollars you described yesterday, if my notes are correct, as the true leasing cost; is that correct? A. Well, I would rather you use the words that the table suggests: "The future worth of the net capital employed in leasing."

Q. Do you remember testifying that that meant that was the true leasing cost? A. I don't remember it exactly in those terms and I don't doubt it and I don't wish to correct it if I did.

Q. You don't wish to correct it? A. That's right.

Q. My note may be in error but that is what it shows. Actually what you did to arrive at that figure was to take the leasing payments each year and from which you deducted what you call the relevant income [1577] tax rate to arrive at what you called capital recovered through tax savings, leaving a net capital employed in leasing, and then you applied the future worth, the rate you obtained from one of your other tabulations—I think it was Table V, Exhibit D50—to that remainder of $19,000, and I am looking at 1939. Isn't that right? A. That's right.

Q. So that you get as a future worth figure of a $25,000 investment in 1939 a figure of $179,000 in 1939; is that correct? A. That's correct.

Q. That is only because you used 14%, isn't it? A different percentage will give you a different figure at the bottom? A. A different percentage would give me a different figure.

Q. Now you are not suggesting by this, are you, that the cost to Hanover in 1939 of paying out $25,000 in leasing charges was $179,000? A. I am suggesting that in considering the two alternative opportunities that one has to take into account the value of that capital over a period of time and here I have applied, for comparison's sake particularly the same future worth factor as in the table on cost of [1578] ownership.

Mr. Hayes: May I have the question again, please.

(Question read.)

Mr. Carson: I object. The answer is responsive.

The Court: Read the answer, please.

(Answer read.)

Mr. Hayes: I submit that is not responsive.

The Court: You may proceed, if you want, to get a better answer.

Mr. Hayes: I don't know if it will be better or not; I just wanted more responsive.

Q. I am talking just about Exhibit 48, Doctor, not about the cost-of-ownership table, and you show at the bottom a future worth of net capital of $179,000 for the year 1939 which you arrived at, as you described, by applying an interest factor for sixteen years to an actual disbursement of $25,500. All that Hanover paid out in 1939 was $25,500, wasn't it? A. Surely.

Q. Are you suggesting that Hanover incurred a real cost of $179,000 by paying out $25,000? A. In the context of this statement and this [1579] table, I am so suggesting.

Q. This $179,000 figure is not a figure that Hanover could have deducted in the year 1939 from its income tax return, is it? A. It is not, but that is not a full picture of the purpose of that statement, as I suspect you realize.

Q. It is not an expense, this $179,000 figure, using the word "expense" in the strict accounting sense? A. The expense, in a strict accounting sense, has no relevance to this table.

Q. Whether it does or doesn't, I want to know if it is an expense in the strict accounting sense? A. It is not.

Q. And the same is true of that bottom figure in each of the years? A. That's correct.

Q. And it is only when you add all of these future values together by applying this percentage based on a 14% so-called cost of ownership or cost of capital that you arrive at this true leasing cost of $2,247,000; is that correct? A. That's correct.

Q. So that although the total payments by Hanover for leasing costs were $1,963,000, according to you [1580] the cost to Hanover was $2,247,000? A. The 1955 worth of the dollars that were tied up over this period of time was $2,247,000.

Q. I thought that was what you meant by the schedule, Doctor. The fact of the matter is that that future worth figure is a pure artifact, is it not? A. Well, if I know what your term implies, I would say clearly not.

Q. Isn't it something that was made by just taking a percentage and applying it to a figure? A. It was made by taking a percentage and applying it to a figure by taking the relevant percentage and applying it in the relevant place to aid in the alternative choice of opportunities.

[1581] Q. Let's take a look at Exhibit 51, which is your Table VI, the economic cost of ownership. Look, if you will, in 1939, at the figures under there. If my recollection serves me correctly, you described Table VI as showing the true economic cost and the last item under 1939, $3,200,000, you described as the worth of capital employed over sixteen years and that Hanover employed that capital.

Am I correct in my recollection of your testimony? A. Under the assumption that I was bound by the Leidesdorf computations.

Q. I am talking about the assumption that you are making as to cost of capital. Leidesdorf didn't bind you as to that figure at all, did it? A. No.

Q. So the Leidesdorf report had nothing to do with that figure? A. It assuredly did not.

Q. This is Corson, is it not? A. That's right.

Q. We couldn't possibly have checked all your calculations, Doctor, but it seemed to us that in order to arrive at that 1939 figure of $3,266,000 that [1582] you applied the 17-year rate to what you called the net capital employed of $352,000. A. I think that is right.

Q. Was it correct to employ the seventeen years? A. This is the sixteenth full year, is it not, and I think it is correct.

Q. The investment was made on July 1st, under the asumptions? A. July 1, 1939.

Q. And the cutoff date was when? A. September 21, 1955.

Q. That would be sixteen years and two months, would it not? A. That is correct.

Q. And the 17-year rate is the one you used, is it not? A. For that particular one year, yes.

Q. And we made a rough calculation last night and came out to a difference of about $300,000 on that figure alone. Would you agree that that would be about right? A. I have not made that calculation. I would still think that is the revelant rate to apply. If [1583] you took an earlier year, it would be a lower figure.

Q. You still think you should apply the 17-year rate for sixteen years and two months? A. Yes. We are talking about the length of time that that capital was tied up.

Q. Which was sixteen years and two months? A. That is correct.

Q. And you apply seventeen years? A. That is correct.

Q. Now, it is that figure at the bottom of '39 which

is the largest single element in your so-called economic cost of ownership, is it not? A. That is correct. But as I pointed out on yesterday, that figure is reduced and increased as subsequent years go on.

Q. That's correct. I am talking about the eventual figure at the end, the $3,197,000—that is the figure you come out with as the economic cost of ownership overall, is it not? A. That is correct.

Q. And you couldn't possibly get a figure like that unless you took the so-called ownership costs, that is, the cost of the machinery for those twenty types, less the depreciation, or the saving on depre- [1584] ciation, of $352,000, and you arrive, from a $352,000 actual investment at a cost to Hanover in that year of $3,266,000, is that corerct? A. I have no idea what that sentence is. I will have to ask to have it read.

Q. Let me restate it. In order to arrive at the $3,266,000 figure at the bottom of '39, all you did was to take what you called the net investment for that year of $352,000 and multiply it by 14 per cent for seventeen years, compounded, is that correct? A. That's correct.

Q. Would you describe that as an artifact? A. Again I can only say I don't know what your word means, but I doubt it.

Q. The actual money that went out from Hanover under the assumptions in Leidesdorf was only $366,000, wasn't it? A. That is an utterly unreal figure.

Q. I am talking about the money that was disbursed out of the bank account.

Mr. Carson: That was disbursed?

Mr. Hayes: Under the assumptions, I say.

Q. Are you suggesting that Hanover would have been paying out in cash $3,266,000? [1585] A. It paid out at least $1,681,000 for new machinery acquired. It had that money tied up over an extended period of time and if the recognition that it was tied up over an extended period of time is an artifact, then this is in fact an artifact.

Q. Let me try again, Doctor. Is the figure at the bottom of the 1939 column supposed to show a cash disbursement by Hanover in 1939 of that amount? A. The table makes it perfectly clear what it is supposed to show. It is supposed to show the future worth of the net capital employed. The net capital employed is made perfectly clear on this table as the actual expenditure in that year.

Q. The actual expenditure was not the $3,266,000, was it? A. No.

Q. I noticed you used a 10-year straight line method of depreciation. Why? A. Well, in consideration of what would be the relevant rate of depreciation, it seemed to me that for machinery of this type this was probably the appropriate one. I suppose one could find a rate of maybe as low as 6 per cent or as high as 12 per cent, but it is difficult to say what is the exact rate that [1586] would be applied by Internal Revenue and this, on the basis of such inquiries as I made, seemed to me to be an appropriate rate.

Q. Did you check the use of the 10-year straight line depreciation rate with United Shoe Machinery Corporation? A. To the best of my knowledge, I did not, but I did call people in the Internal Revenue Service to inquire as to the relevant rate.

Q. Did you find it difficult to find a relevant rate? A. Without being able to describe all the machinery exactly, I couldn't say.

Q. I show you Bulletin F. Are you acquainted with that? A. No, I am not.

Q. That is depreciation rates, Federal Tax Reporter, and I read to you, and you better follow me so that there is no question that I read it accurately——

> "The principal leather manufacturing industry is the making of shoes and the average composite life of shoemaking machinery is approximately fifteen years."

[1587] Did I read it accurately? A. You read it accurately. I don't know whether that is the applicable factor to guide me in this decision.

Q. Can you refer me to any other authority which makes the ten years the applicable life? A. No, I cannot.

Q. You cannot. Now, as a consequence of your using ten years, let's go over to Exhibit D-51 to 1949 where there were disposals in that year and in every year except '50 thereafter and you showed—you took the disposal value, and each year the disposal value was pure salvage, wasn't it, because there had been a complete depreciation? A. There were in these latter years.

Q. That's right. And you applied to that a 25 per cent capital gains tax, right? A. That is correct.

Q. And then you arrived at an after tax disposal recovery? A. That is correct.

Q. And you deducted the disposal recovery from the ownership cost to arrive at a figure; correct? A. That is correct.

[1588] Q. Now, if you use a 15 per cent rate, would there have been any salvage—would there have been any capital gains tax in the year 1949? A. Do you really mean, Mr. Hayes, a 15 per cent rate?

Q. Did I say 15? I am sorry; a 15-year life, Doctor. I misspoke. If you used a 15-year life, would there have been any capital gain in 1949? A. In the year 1949, I don't know without looking, but in the year 1949 I presume not.

Q. And the same would be true of each of the other years because you took a 10-year life, wouldn't it, necessarily? A. Each of the other years?

Q. Yes. A. Do you really mean that?

Q. Yes, I do. A. In the year 1955, in which, according to the assumptions most of the disposals were made, a 15-year life would have run out on a lot of this machinery, and, as a consequence, without again having had the opportunity to check this back, that particular year in which most of the disposals were made, would still have had the same result.

[1589] Q. That is because of the particular lives that were used in Exhibit 41, isn't it? A. No, I don't think it is.

Q. If you had used one of the tabulations based on the 15-year life, they would all have expired in 1954, would they not? A. Yes, that might be, the Hanover machines——

Q. Yes, because of the difference in lives that happens to be true, isn't it? A. Yes, that could be.

Q. Yes.

* * *

[1590] *Redirect Examination by Mr. Carson*:

Q. Dr. Corson, in identifying Plaintiff's Exhibit 41 yesterday, at Page 1351, I think I erroneously used the date March 10, 1962, as the date of the letter of transmittal because I was referring to an older draft of the same document. A. I noticed that date.

Q. You understood that I was referring to the exhibit you have in front of you which does carry the covering letter of April 19, did you not, Dr. Corson?

* * *

[1591] Q. In questioning you with reference to Plaintiff's Exhibit 41, I called your attention, if you will remember, to the other four Leidesdorf tabulations which have been marked Plaintiff's 37, 42, 43 and 46, and asked you certain questions about them. A. I recall.

Q. Is it the fact that in your preparation for your testimony and in your testimony here you have taken into consideration all those five Leidesdorf exhibits? A. I have.

[1592] Q. Now, in the exhibits or tabulations prepared by you and offered by the defendant, marked D-48 and so on, specific reference is made to plaintiff's 41, which embraces 20 major machine types, do you recall? A. I do.

Q. Did you prepare similar tabulations with respect to the other two exhibits of plaintiff dealing with the same 20 major machine types, namely, 37 and 42? A. Did I prepare tabulations, similar tabulations?

Q. Or calculations, yes. A. In the preparation of this material, I explored each of these alternatives sufficiently to give basis for the statement I have made that they would not alter my conclusions with respect to these factors that I have added, but I did not complete tabulations of the same sort with respect to each of the other Leidesdorf tabulations.

Q. With respect to Nos. 37 and 42, do I correctly understand that your conclusions overall, are substantially the same as with respect to 41 which also deals with the 20 machine types? [1593] A. They are indeed.

Q. Now let me address your attention to the two others, Nos. 43 and 46, which deal with 38 additional machine types involving smaller revenues, smaller amounts, and they

were numbered by the plaintiff or by Leidesdorf Nos. 21 to 58, inclusive.

What consideration did you give to these in connection with your conclusions as to No. 41? A. I gave it the same kind of consideration. They came in late, and as a consequence I had less time and my tabulations were developed in considerable part before I saw those, but what I did was to pick out of those those machines that had the greatest usage or the greatest rentals and attempt to determine, particularly in comparision with the rentals in the first 20 machines, whether they could be expected to have any different result.

I am satisfied that there would be no different result. The same kind of analysis would yield the same kind of result if applied to those three machines.

Q. And the kind of result that you would reach with respect to those 38 machines is that on the application of the three factors you talked about, [1594] the economic cost of ownership would be greater than the economic cost of leasing? A. That is correct.

Q. Did you determine by just how much? A. I did not.

* * * *

[1614] Q. My next question, Dr. Corson, is addressed to some testimony you gave in answer to Mr. Hayes about an assumed interest rate for borrowings in connection with the figure you were given for the cost of equity capital.

You expressed some views in answer to questions of Mr. Hayes as to the cost of capital involved in the borrowing when related to the cost of capital, the equity capital.

Do you remember the subject I am talking about? A. Yes.

Q Do you have any economic authority for the answer you then gave? A. The point of view I then stated—the

opinion I then stated, it seems to me, is borne out by a very brief statement in one of the books I referred to on yesterday, page 136 of the book entitled "The Management of Corporate Capital," edited by Ezra Solomon in this particular section or chapter—

> Mr. Hayes: What page was that Doctor?
> The Witness: Page 136.

A. (Continuing) This particular chapter is "Measuring a Company's Cost of Capital," and it was [1615] written by the editor of the volume, Dr. Solomon, and considers several approaches to the consideration of the cost of capital, and the one on page 136 that he designates "Approach A" he discusses in these terms:

> "One approach is to take the supply of equity funds as given"—if I may interpolate, that would be to take, in this instance, the capital already invested in Hanover—"and to assume that all increments of financing over and above this are derived from borrowing."

Several of Mr. Hayes' questions assumed that you would borrow over and above the capital already employed.

> "The relevant cost of new capital is simply the net (after-tax rate) payable on an increment of borrowed funds. Proposals which promise a net rate of return greater than this cost should be accepted. This approach suffers from a number of serious defects, and it should be rejected. The most important defect is that it fails to recognize that debt funds generally cannot be used without committing some proportion of equity funds, and that these

equity funds also [1616] involve a 'cost' because alternative uses of such funds exist, for example, dividend payments. Because it ignores the cost of equity funds, Approach A provides a wrong criterion for judging the acceptability of investment proposals. Whenever the next cost of equity funds is higher than the net cost of debt funds (and this is the usual case) the use of this approach will lead to the acceptance of proposals that should probably be rejected. This inherent error is easily demonstrated by means of a simple arithmetic example."

Then there is an arithmetic example, but I don't think it is necessary to read it——

Q. But you have it available in the book if requested? A. I do.

Q. Let me draw your attention a minute to the instance that was given to you of a secondary issue of Hanover Shoe in April of 1956. Do you remember being questioned about that by Mr. Hayes? A. I do.

Q. Did you or did you not take that issue and the price thereon in consideration in arriving at your estimate of the cost of capital at Hanover in [1617] that period? A. I did not.

Q. Why not? A. I studied that but I did not take it into account for the reason that it was beyond, as I hope I made clear in response to Mr. Hayes' questions. The period that was here under review and it did not seem to me, as a consequence, relevant. It seemed it would subject me to the same kind of criticism that Mr. Hayes implied in his questions that suggested I should have taken into account only the rate of cost of capital for the year 1940.

It did not seem to me relevant to the period under review.

Q. What is the proper practice and procedure in dealing with the proceeds to the issues of an issue of stock on the market in connection with appraisal of the cost of capital? That is, should one take the net proceeds after underwriting costs and the cost of flotation or the gross proceeds? A. I think they should take the net proceeds.

Q. On the balance sheet, in what form is capital ordinarily carried? A. Capital is normally carried on the balance [1618] sheet as a liability, a liability of the corporation to the stockholders. On the one side you customarily have on the balance sheet the assets and on the other side the liabilities and the capital is customarily included with liabilities as a liability to stockholders.

Q. You were asked a number of questions about various parts of your testimony which involved the use of the words "economic concepts," such and such being economic concept, and sometimes questions compared economic concepts with accounting concepts.

Would you tell the Court how, if at all, the economic consequences of business decisions judged by economic concepts are carried into a company's balance sheet? A. I said in answer to some of Mr. Hayes' questions that in the long run they inevitably are reflected in the balance sheet and the profit and loss statement.

To make that specific, in this instance I would expect that the kind of decision here involved related to the use of capital is reflected in A, perhaps if debt is used—if debt is used, I should eliminate that, perhaps—it is reflected [1619] in the actual out of pocket expenditures for the interest on that debt.

In the cost of common stock, capital is applied by the sale of common stock, or in capital supplied by the retention of earnings, it is not as apparent. That was the term I used yesterday morning in describing this, but it is reflected over a period of time in the rate of earnings in relation to stockholder equity.

The relation of the actual earnings shown on the profit and loss statement related to the stockholders' equity, that is, the total assets less total liabilities to other than stockholders—it is reflected in those two figures, one compared with the other, one from the profit and loss statement and one from the balance sheet, and in the long run it is reflected in the surplus account and, hence, in the per share value, the book value, of the stock.

In this proceeding it is interesting to note, as Mr. Hayes helpfully brought out, that there was an agreement, if I understood him correctly, that if someone sold their shares, they were to sell them at a book value. It would be precisely related at that time in that figure which would be taken from [1620] the balance sheet.

Q. You were asked some questions in connection with future worth, to bring out that in your calculation an application of the future worth figure on Exhibit D-51, dealing with the economic cost of ownership—you used a figure based on a period of seventeen years. Do you remember that? A. That is correct.

Q. Was the same figure used by you in the same respective years of the period in calculating future worth of capital employed in connection with the economic cost of leasing? A. Precisely the same factor was used in each instance.

Q. It was the same 17-year period that was the basis in each instance? A. It was the same 17-year period.

Q. You were asked questions based on your 10-year straight line depreciation reflected on Exhibit D-51. Do you remember that? A. Yes.

Q. You began to make some answer concerning the practice of the Internal Revenue Service. Did you complete your answer on that? You made some [1621] inquiry of the Internal Revenue Service? A. I made a telephone inquiry at the time to find out what was the appropriate rate, and perhaps it was my inadequacy in describing the machinery, but I was told that an appropriate rate would be 10 per cent.

My answer to Mr. Hayes' point that a 15-year life was simply to imply that I am not sure that stipulates the rate that would have been used, but I think it is relevant to point out that had I used the rate that Mr. Hayes suggests I should have, by his questions, I would have in this way increased the future worth of the net capital employed. I would have increased the net capital employed and would have come out with a result that is greater than it is presently stated in D-51.

Q. That is, by depreciating less in the year by year, for fifteen years, you would produce a greater balance, subject to the future worth factor? A. That is precisely what I mean.

* * *

[1622] *Recross examination by Mr. Hayes:*

Q. You testified on redirect examination, Dr. Corson, that with respect to the secondary issue which took place in 1956 that the proper—you suggested that the proper way of determining would be on the net amount received by the corporation, is that correct?

* * *

Q. I did a little arithmetic, that if you take the $25 price which the new shareholders pay, it would come out to an 8.4 per cent return, the $2.09, and if you take the $23.25 which the corporation received, it would come out to just under 9 per cent.

I take it you don't dispute these figures? A. I have no reason to dispute them.

Q. In either event, it would be substantially below the 14 per cent. Did I understand you to say that capital stock is carried on the liability side [1623] of the balance sheet and is a liability to stockholders? A. A liability of the corporation to its stockholders was what I said.

Q. In what sense do you use the word "liability"? Not in the same sense that you use "liability" with respect to a creditor on the accounts payable, is it? A. No. Here is an illustration of precisely what I am saying: This is the balance sheet of Hanover Shoe, Inc., for December 31, 1940, and at the bottom of the page is the term "liabilities." Under that is "current liabilities" and "capital."

Then there is a statement "total liability is $4,684,000," which includes the two.

[1624] Q. That's the internal statement that was prepared. Now, what is the usual heading that is used in financial statements? You are acquainted with them, aren't you, Doctor? A. I think so.

Q. On the left you have the assets. And on the right, the usual heading is what? A. I think this is not unusual.

Q. What is the usual heading, do you know? A. I wouldn't supply any other. I think this is usual.

Q. Do you ever see the words "liabilities and capital"? A. This is not uncommon.

Q. It is very common, as a matter of fact, is it not? A. It is very common.

*Extract from Deposition of Raymond F. Purtell*

Q. That's right. And, as a matter of fact, while debts are liabilities because they can be sued upon, capital stock is not in that sense a liability, is it? A. Not in a sense, but I made clear in my statement that——

Q. I wasn't sure whether it was or not. I [1625] just wanted to be sure that the record was correct.

Mr. Hayes: No further questions.

* * *

[1716] Mr. Carson: Defendant offers the deposition of Raymond F. Purtell taken first in New York and adjourned to Beloit, Wisconsin, June 8 and August 15, 1961.

* * *

Page 3, third question:

"Q. What is your present occupation, please? A. I am vice-president of manufacturing of Freeman Shoe Corporation, Beloit, Wisconsin.

"Q. Were you at any time in the employ of plaintiff, The Hanover Shoe, Inc.? A. Yes, I was.

"Q. In what period, please? A. I am not sure exactly of the month. I think it was November 1949-1950, through January 1, 1955-1956. [1717] I am not sure of the date."

* * *

[1722] "Q. At the Emmitsburg plant, what was the line of machinery in place when you first saw it? A. I heard say that the machinery at the Emmitsburg factory was primarily the same machines that were in the Hanover factory, with the exception, perhaps, that—since you raise the question about the cutting department, I believe all the clickers in [1723] the Emmitsburg factory were all United clickers.

"From that point on it was the same machinery that was in use in Hanover.

*Extract from Deposition of Raymond F. Purtell*

"Q. When production ceased at the Emmitsburg plant, what was done with the machinery there? Do you remember it? In other words, was it returned to United or to the other lessors, if any, or was it transferred to the Hanover plant? A. To the best of my knowledge, we re-evaluated the machinery that was in Hanover on a lease basis or the machinery other than United in other departments and we consolidated the machinery from the two plants and returned the surplus machines.

"Q. To United in the case of its machines and to other lessors if there were other rented machines? A. If there were other machines, then they were returned.

• • • • •

[1725] "Q. After you became superintendent, to whom did you report in the regular line of your duty? A. To Mr. Lawrence Sheppard.

"Q. Anybody else? A. No, not directly.

"Q. Do you recollect having become a member of the board of directors of the Hanover Shoe, Inc., in 1952? A. I could not tell you the actual time but I became a member of the board of directors at some time.

"Q. And after you became a member, the date being established by an exhibit in this case, Defendant's Exhibit 61 for identification, did you regularly attend directors' meetings? A. I did.

"Q. Were you at any time elected an officer of the company? [1726] A. I was.

"Q. What office? A. The office of vice-president.

• • • • •

[1727] "Q. Would you search your memory, Mr. Purtell, and tell us whether, at the time you entered the employ of Hanover, around the beginning of your employment as assistant superintendent, you were informed by anybody

[1855] LEWIS B. WALKER, called as a witness on behalf of the defendant, being duly sworn, testifies as follows:

*Direct Examination by Mr. Carson:*

Q. Will you give us your business and residence address, Mr. Walker, please? A. Business address is 140 Federal Street, Boston, Massachusetts; my residence address is Marblehead, Massacusetts.

Q. Are you now in the employ of defendant, United Shoe? A. Yes, sir.

[1856] Q. And you began your employment in the year 1911, did you? A. Yes, sir.

Q. After graduating from Amherst College? A. Yes, sir.

Q. Now, would you sketch very briefly with the dates the nature of your connection with United from 1911? A. Well, from 1911 to 1920, I was a trainee in various branch offices which included Lynn, Marlborough, Milwaukee, New York and Boston.

From 1920 to 1935, I was assistant district manager of our St. Louis territory.

From 1935 to 1940, I was district manager of our Milwaukee territory.

In 1940 until the present time, I have been in the Boston office as a member of the management firm since 1958 as a consultant to the law department.

Q. Did the status of your employment change in the year 1958? A. Yes.

Q. In what way? A. I relinquished my management duties, resigned as a member of the board of directors and became the [1857] consultant to the law department during the pending litigation.

Q. By the "pending litigation" you referred not only to the Hanover suit but to the series of private antitrust suits? A. Yes, sir.

Q. When did you first become a member of the board of directors? A. In 1954.

* * * * *

Q. Do you recollect discussions with Mr. Sheppard in this period, and, if so, I will ask you to fix the date, concerning the leasing policy of United? A. Well, I remember very distinctly Mr. Sheppard, I think on several occasions, speaking about his encounter with Colonel King on the leases in the early stage of his connection with the Hanover Shoe Company. Mr. Sheppard had very strong feelings on that, and told that incident several times.

* * * * *

[1867] Q. . . . Do you recollect anything else being said by Mr. Sheppard as to United's leasing policy in the conversations you had with him in 1940 to 1955? A. Well, I think at one time he was a little confused and a little unhappy about having to get a license from the BB Chemical Company on a patent that they held and under which he had to be licensed before we could ship the machine that used that license.

Q. Well, I will now ask you, Mr. Walker, you said he was confused and unhappy, and I am asking you what he said in words or substance. A. Well, I can't quote the exact words, he didn't understand it, and he didn't know why he had to do business with the BB Chemical Company to get a United machine.

Q. Is what you have testified the whole of what you remember of Mr. Sheppard having said in the period as to

United leasing policy? A. Well, I was present with Mr. Kiendl and Mr. [1868] Ward during that visit.

Q. You are referring to the visit of June, 1950? A. Yes, sir.

Q. And you heard that conversation? A. Yes, sir.

Q. Now, apart from that was there anything else you remember Mr. Sheppard said about the United leasing policy or practices? A. No, I don't recall anything specific.

* * * * *

Q. Now, in the course of dealing with its lessees in 1940 to 1955, did United render any services other than repairing the machines? A. Yes, we had Boston office technicians who [1877] tried to give service beyond what the branch office personnel could give; we also had a planning department, we had what was known as a Shoe X department, which really consisted of expert shoemakers, most of them had been superintendents who gave a quality service.

Q. Were any of these services rendered to Hanover by United in 1940 to 1955? A. Yes, they were.

Q. Will you tell the Court which ones? A. I think all of them.

Q. Can you specify, give us any detail? A. No; I know that we did considerable planning department and layout work on fitting rooms. I know that we had certain people from the Shoe X department down there on general shoe making, and I know that we had many of the Boston office technicians down there helping on problems where either the branch office or the Hanover people wanted help beyond what they were getting from the local office.

* * * * *

Q. How did these services come to your knowledge; did you have anything to do with them, is my question? A. Well, the operating department and their [1877a] personnel reported to me and the Shoe X department reported to me and, as in any organization, the people in charge of these departments wanted to keep me as a member of the management posted on what they were doing.

[1878] Q. Will you describe to the Court what the Right of Deduction Fund was? A. At the time the Form A leases came into existence, as a result of conferences the corporation agreed to set up a fund at that time amounting to 2 per cent out of the rentals and royalties paid on the new Form A leases to be used against the fixed deferred payment listed in the Form A which we began to sign them.

Q. How was that fund operated in the period 1940 to 1955 in so far as it came to your attention? A. By that time the fund had been increased to a 4 per cent figure and that was set up and was used not—could be used not only to apply against the deferred license fees stated in the leases but it could also be used to wipe out the four largest payments for use less than minimum on any machines on which we made any charges.

Q. You mean in each year the four months in which the payments were used would be the biggest? A. Yes, the most favorable to the lessee.

Q. You spoke of 4 per cent of rents and royalties—or was it just royalties? A. No, rentals and royalties, charged under the [1879] Form A leases.

Q. This 4 per cent was a deduction, was it, or a credit, rather, with respect to the payments of each lessee? A. I am not sure I understand exactly what you mean.

Q. Put the thing your own way. On what was the 4 per cent computed? A. If the charges were $100 in any given month, $4 would be set up on the books in that fund.

Q. My question was, was this done on a wholesale basis or lessee by lessee? A. Lessee by lessee.

Q. So that there was a Right of Deduction Fund credit for Hanover on the books of United? A. Yes, sir.

* * * * *

*Lawrence B. Sheppard—Cross Examination:*

[136] Q. That was about the year you became president of the National Shoe Manufacturers Association? A. I became president of the National Shoe Manufacturers Association I believe in 1946. Perhaps—I think our annual election of officers in that Association is around November, I believe.

Q. You continued as president I think you told counsel until 1949? A. It was a four-year term.

* * * * *

[146] Q. Can you look at the lefthand side of the four pages of this document and tell the Court whether you now remember having known that one or more machines of each type of United were ever leased by your company before 1955? A. One or more of each type?

Q. Yes, sir. A. I can't say that from memory.

Q. You can't say it? A. No, not from memory, I can't.

Q. You can't remember the machine types? A. Of course I can't. There must be—I don't know how many of these optional machines there were. There were great quantities of them, numerically, and they were small, inconsequential machines that [147] naturally one would not give

too much thought and effort to. I think the optional machines amounted to only 3 per cent of our royalty and rental bill. Now, I will be glad to study this and try to anwser it, but from this sheet of paper, I can't answer it as to each group here.

* * * * *

[205] Q. Were you familiar with a Moenus Company? A. A Moenus,M-o-e-n-u-s, or something like that, yes.

Q. Did you make a fairly large number of machine equipment adaptable to your use? A. No, sir, not adaptable to our requirements.

Q. Did they make any adaptable to your requirements? A. We tried a couple of Moenus, different types.

Q. No. First my question was, did they make any adaptable to your requirements? Can you answer that? A. I am not sure. I know that we tried some. To the best of my recollection we returned them all as unsatisfactory.

* * * * *

[207] Q. Did you ever hear of the Dania, D-a-n-i-a, Company in Denmark, a manufacturer of shoe machinery? [208] A. Yes, I have.

Q. Did they in your judgment and opinion in the period manufacture any shoe machines adaptable to the use of your company? A. I believe I might be, confused with Pedersen in my answer.

Q. They are different companies? A. That is what I was searching for. If they are different companies—it runs in my mind we tried a Dania machine or two, I can't tell you what they are, and I am quite sure we didn't keep any of them. We returned them.

Q. Wasn't the Jupiter stitcher manufactured by Pedersen or Peterson? A. Pedersen.

Q. Did you try that? A. Yes, sir.

Q. Did you keep it or reject it? A. We rejected it at that time. Since then—and quite recently—they have revised, revamped the machine, rebuilt the machine. We have one, and bought it, and it is very satisfactory. It is the first one that has done competent, comparable stitching to the Goodyear stitcher.

* * * * *

[213] Q. Now, the friends which were on the committee or on the trip to whom you referred included Allan Cadwell, who later joined your company? A. That's right.

Q. And also included, besides others you [214] have named, Henry W. Boyd? A. Yes, sir.

Q. Who was then chairman or president of Genesco? A. He was president of General Shoe at that time; since Genesco.

Q. Later called Genesco? A. Yes, sir.

Q. One of your competitors in the distribution of men's welt shoes? A. Competitors are right friendly in the men's shoe industry.

Q. Sir? A. Competitors are frequently right friendly in the shoe industry.

Q. I am not questioning your friendship. You were very close? A. Yes. Mr. Cadwell too, and Mr. Byron Gray also.

Q. You discussed with Mr. Boyd all he knew, I take it, about non-United Machinery during the course of the years? A. Frequently, frequently, although Mr. Boyd never considered himself a shoemaker per se. [215] Mr.

Boyd is a brilliant man but leaned on the financial side. He never had too much factory experience. He is very brilliant, I am not—

Q. Do you consider yourself a shoemaker per se? A. I would like to. I lived in a shoe factory for 20 years part time, and the rest of the time—

Q. Before December, 1955, on how many occasions would you say you discussed with Mr. Henry Boyd— A. I would not have any idea.

Q. —your problems in shoemaking and shoe machinery? A. I did not discuss with him ever, to the best of my knowledge, about our problems in shoemaking.

Q. I am sorry, I will rephrase that question. You did not discuss with him Hanover's problems; is that what you mean to say? A. No, we confined—that question was confined to shoemaking.

Q. All right. I will ask the question in the broader terms as to whether you discussed with him, before 1955, shoe machinery and the availability [216] of shoe machinery of all kinds. A. Yes, on occasion.

Q. How many times did you have discussions with him before September, 1955? A. I would not have the least idea. Whenever I ran into him in a shoe show or accidentally in New York or some other thing. I wouldn't have the least idea how many times I saw him in that period.

Q. You are accustomed to visit the annual shoe shows in this country? A. Off and on. I do not go regularly.

Q. Chicago and St. Louis. A. I have never been to St. Louis but once to a shoe show, and that was many years ago.

Q. And on those occasions you would meet Mr. Boyd? A. Not all of them. Perhaps he wasn't there. Many occasions we were together.

Q. Is it fair to say six or ten times you have talked over the subject of shoe machinery with Mr. Boyd before 1955? A. Yes, I think so.

Q. And you did not hold back any knowledge you had from him, did you? [217] A. We never held back anything from each other knowingly.

* * * * * *

[219] Q. You were interested in buying shoe machinery for which no royalty or rent would have to be paid, weren't you, at that time? A. Very much so.

[220] Q. That fact does not refresh your memory? A. No, it doesn't refresh my memory. I see no reason way it should. That machinery they used, no doubt we tried a lot of it. We tried some 40-odd machines on trial, bought about 20, and 10 of them we shouldn't have bought. I don't think they knew anything we didn't know about the availability of shoe machinery.

* * * * *

[233] Q. Now, is it the fact that after the organization of the technical committee in 1949 you participated actively in its proceedings?

* * * * *

[335] Q. You examined the material submitted to you by Mr. Anthony, did you? A. Oh, I beg your pardon.

Q. I said, do you remember? I am asking you now. A. Yes, I remember quite a little bit. The major themes.

Q. Tell us what you remember about it. A. Well, the particular things I remember was, of course, the cost of

capital which I heartily disagree with, and there are some other things in the book I disagree with a good deal.

Incidentally, it was the opinion of my associates we were not going to accept a lot of his theories of how to measure whether to buy or not to buy a machine, the purchase of a machine.

Q. When you refer to his having mentioned the cost of capital, you disagree with, are you referring [336] to page— A. I don't remember what page.

Q. I am just going to ask you. A. All right.

Q. When you referred in your answer to his having discussed the cost of capital and the way you disagreed with it, were you intending to refer to discussion at page 39 of this book called "Required Earnings Rate"? A. No. I wouldn't possibly know. There was a great deal in his book that I disagreed with completely.

Q. Would you be good enough to direct your attention and please be so kind as to direct your attention to this "Required Earnings Rate" part regardless of whether you disagreed with other parts? A. Do you wish me to re-read it?

Q. Yes, if you have to re-read it. A. Well, I do.

Q. Tell us if that is the part to which you previously testified you didn't agree with Mr. Anthony about?

Mr. Hayes: By your question, Mr. Carson, [337] do you mean one of the parts?

Mr. Carson: One of the parts, yes.

(Witness reads document.)

A. I read this much. Now if you—

Q. Do you know what my question is? What are the parts you disagree with? A. I disagree with this whole page I read, practically, in its entirety.

Q. All right, now, you noticed the sentence on that page which says:

> "The other factor that needs to be thought about is the earnings that you expect to make on an investment in shoe machinery."

A. Yes.

Q. "This is expressed as a rate, or per cent, figured after income taxes."

Part of that you disagreed with, is that it? A. Beginning up here I disagreed with the "after taxes."

Where is it? Right here. I disagreed with that heartily. This part down here I heartily disagree with.

Q. I am directing your attention to the whole sentence, not just the words "after taxes." [338] A. That is practically the sentence, isn't it, here?

Q. I read you two sentences. Is that part of the section you disagreed with? A. Yes.

Q. All right, that includes the words "after taxes." A. Yes.

Q. And you knew at the time what—

> Mr. Carson: Does your Honor wish to look at this so he can borrow it?
>
> The Court: Yes.

Q. And you knew at the time that you were looking at the manuscript, or the book, what per cent Mr. Anthony thought ought to be taken by shoe manufacturers as a cost of capital in connection with deciding whether to buy shoe machinery or to lease it, did you? A. Yes, sir.

Q. What figure was it that you understood he recommended? A. On this page I just looked at?

Q. Well, I am just asking if you can remember, if you carry it in your mind. A. No, my memory—with reference to 5 or 6 [339] per cent on the page we were talking about. I remembered it after I read it, of course.

Q. You see on page 39 the words:

> "The appropriate figure is considerably higher than the interest rate of 5 or 6 per cent."

Is that what you are referring to? A. Appropriate figure of what?

Q. I was calling attention to the middle. Is that what you were directing my attention to? A. Yes, sir.

Q. At the end of his discussion of that subject on the bottom of page 40, I call your attention to the fact that he gives a figure overall which may be—I am paraphrasing—30 per cent or 35 per cent or even higher, and he ends by saying:

> "It seems likely that most shoe manufacturers will want to use a rate that is somewhere between 10 per cent and 20 per cent."

Do you see that? A. Yes.

Q. And you knew that at the time you were examining the manuscript of the book? [340] A. I doubt if I remembered anything or considered anything contained in Mr. Anthony's book when we were considering purchasing machinery.

Q. I am merely asking you whether you knew what is written here as the views of Dr. Anthony at the time, whether you agreed or disagreed. A. At the time we were—

Q. In 1955. A. —making up our mind to buy. No, I doubt if I remembered what Anthony said. I disagreed with Anthony's book, cover-to-cover almost with the exceptions.

* * * * *

[398] Q. You recall, do you not, that yesterday Mr. Carson examined you in some detail concerning the activities of the Technical Committee of the NSMA vis-a-vis United Shoe during 1950? A. Yes, sir.

[339] Q. And do you recall that he called to your attention the fact that the rates were increased on July 31, 1950? A. Yes, sir.

Q. I show you Exhibit D-21, which was marked in evidence yesterday, and I direct your attention to the third paragraph, which begins at the bottom of page 1. Would you read it, please. A. Shall I read it aloud or read it—

Q. No, no, to yourself.

Have you read it? A. I read this, yes, sir.

Q. Now I ask you, Mr. Sheppard, whether before July 31, 1950, the Technical Committee and you knew that the United Shoe Machinery Corporation was planning an increase in rates. A. I think there had been some rumors, but at this meeting that this refers to it seems that probably Mr. Brown was asked and spoke about it.

Q. So was the July 31st notice of increase a complete surprise to you? A. Well, the way in which it was done I think was a surprise to the whole industry.

Q. Was the fact that there was an increase a [400] surprise to you? A. No.

Mr. Hayes: Would you mark this for identification, please.

(Marked Plaintiff's Exhibit 24 for identification.)

Mr. Hayes: I have asked that there be marked for identification a communication from W. W. Stephenson, S-t-e-p-h-e-n-s-o-n, to the Technical Committe naming eight members, one of whom is L. B. Sheppard, August 29, 1950, to which is attached a proposed—it was denominated a proposed statement from the Technical Committee to the United Shoe Machinery Corporation.

Q. Mr. Sheppard, I hand you Exhibit P24 for identification. Did you receive that as a member of the Technical Committee? A. Yes, sir.

Q. And was there attached to it the proposed statement which is presently attached to it? A. Yes, sir.

Mr. Hayes: I offer it in evidence.

Mr. Carson: No objection.

The Court: Admitted.

[401] (Plaintiff's Exhibit 24 for identification received in evidence.)

Mr. Hayes: Would you please mark for identification—and this was Defendant's 252 for identification on Mr. Sheppard's deposition—this document entitled "Opening Statement at the Meeting with the Shoe Manufacturers Technical Committee."

(Marked Plaintiff's Exhibit 25 for identification.)

Mr. Hayes: May we have permission to withdraw this in order to make these copies? Could you then do that for us?

The Clerk: Yes.

The Court: Do you need it at the moment?

Mr. Hayes: No, no, overnight will do.

The Court: All right. Give it to Mr. Frank.

Q. Mr. Sheppard, you testified yesterday to a meeting between certain members of the Technical Committee and high officials of the United Shoe Machinery Corporation, which took place, if I recall correctly, at some date in September, 1950, at which you were present. Do you recall testifying to that? A. Yes, sir.

[402] Q. And at that meeting was Mr. Brown present? A. Yes, sir.

Q. And who was Mr. Brown at that time? A. Mr. George Brown was the president of USMC.

Q. Did he make a statement at that meeting? A. Yes, sir, quite a lengthy statement.

Q. And I show you now Plaintiff's Exhibit 25 for identification and ask you if that is a copy of the statement. A. I am quite sure it is.

Mr. Hayes: I offer it in evidence.

Mr. Carson: What was the witness' answer to that?

Mr. Hayes: "I am quite sure it is."

Mr. Carson: No objection.

The Court: Admitted.

(Plaintiff's Exhibit 25 for identification received in evidence.)

Mr. Hayes: With your Honor's permission I would like to read into the record a short excerpt from each of these exhibits.

The Court: You mean 24 and 25?

Mr. Hayes: Correct.

[403] Exhibit P-24, which has been identified as the communication from Mr. Stephenson to the Technical Committee to which was attached the proposed statement from the Technical Committee to the United Shoe Machinery Corporation, sets forth at page 4 specific suggestions that the NSMA was making to United Shoe Machinery Corporation, and now I read.

(Mr. Hayes reads from Plaintiff's Exhibit 24 in evidence.)

Mr. Hayes: I skip No. 1.

No. 2:

(Mr. Hayes continues reading from Plaintiff's Exhibit 24 in evidence.)

Mr. Hayes: I read now from Exhibit P-25, Mr. Brown's statement at the meeting with the Technical Committee at some date in September, and it reads, beginning at the bottom of page 8:

(Mr. Hayes reads from Plaintiff's Exhibit 25 in evidence.)

Mr. Hayes: I skip No. 1 again.

(Mr. Hayes continues reading from Plaintiff's Exhibit 25 in evidence.)

By Mr. Hayes:

Q. Now, was the meeting in September, 1950, [404] at which Mr. Brown made that statement, the same meeting

at which you testified you were the spokesman for the Technical Committee? A. Yes, sir.

Q. Would you tell us what you said as spokesman of the Technical Committee so far as you can now recall? A. I said nothing until after Mr. Brown had finished his opening statement, which had been prepared; he evidently was reading from it. Now, I am sorry that I can't tell you what I said. I was quite upset, quite infuriated, at Mr. Brown's paternalistic attitude toward the entire industry and his posing as a benevolent benefactor of some kind—not he personally, I don't mean that—as a benevolent benefactor over all these years, and then during part of that dissertation lecturing us on how fortunate we were in having somebody tell us how to run our business and not—I am sorry, I don't know what I said. You will have to get that from somebody else.

But I told him I did not appreciate the attitude, and that we had come there in good faith to discuss our mutual problems; and as indicated in that [405] memorandum, the two things I think the manufacturers were most anxious to discuss were the two points on modifying leases so that after a machine had earned itself out three or four times maybe you could buy it or they'd give it to you. That wasn't in much detail but that was the theory, the two points I referred to. And the door was slammed on that pretty quickly by stating that since they had a case pending before the District Court they wouldn't discuss leases or anything else about and then added, as I recall—my memory was refreshed by your reading it—adding that it sounded like perhaps we didn't want any leases and he thought that was pretty ridiculous and could not believe it.

I am sorry, I can't—I think maybe I was a little bit heated up.

Q. Is that the substance of what you said in so far as you can recall? A. In so far as I can remember.

• • • • •

[410] Q. This morning also Mr. Carson, in referring to various of the tabulations that had been prepared by Mr. Spears prior to the 1955 purchase, brought out that one Goodyear rapid lockstitch was continued on lease; do you recall that? A. I do.

Q. Will you give us the reasons why that was continued on lease, one machine? A. Yes, sir. I think—I have testified on that one particular machine before, but the reasons were that we bought X number of Goodyear stitchers, and it was, as I recall, a rather tight fit on production. We had two lease machines in the plant when we made the final decision to purchase machines that we did purchase.

Q. You mean two lease machines over and above you purchased? [411] A. Over and above.

And in talking it over, because of the narrow margin of production ability, because if a machine broke down it could not be almost immediately repaired, we thought it wise to continue this machine on lease as a spare machine, and if a day's work involved some more difficult Goodyear stitching than a normal day's work and the operators got a little bit behind, they could throw this machine in. It was a part-time machine and has always been considered a part-time safety substitute.

• • • • •

[2314] "Q. Were machines offered to you that you did not buy? A. I don't remember that one way or the other. The company's policy was very definitely to buying machinery instead of leasing them if they could buy them. That has been the feeling since I have been with them in 1921."

* * * * *

[2315] "Q. Well, in view of what Mr. McAllister has stated, let me put it this way, Mr. Sheppard: Can you say whether or not your company, before 1955, purchased from United Shoe all of its machines available on optional terms for purchase or lease? A. Yes. I can—" then there is an interruption.

[2316] "Q. Which were adapted to the operations of your company? A. Yes. I can say we did not.

"Q. You did not? A. No.

"Q. Now, am I correct in my recollection that you previously testified that your desire and your purpose was to buy all the machines that you could rather than lease them? A. Yes; you are correct as a general statement.

"Q. Can you state any reason why in those circumstances you did not purchase all the machines available to you on optional terms? A. There I think you'll have to be more specific as to what machines you're talking about, Mr. Carson. There are different reasons why we did not buy certain machines.

"Q. Can you state any of the reasons? A. Yes. They're priced too high; it would take too long to pay for them based on the rental and royalty—rental, not royalty, that was being charged for them; they were low-cost machines and would perhaps take ten years to pay for in some

cases, and in some instances there were either rumors of or actually had later models [2317] come out to supersede the models that were offered. So—

"Mr. McAllister: To clarify that answer, when, Mr. Sheppard, you referred to them as low-cost machines, what did you mean?

"The Deponent: Low cost as to rental.

* * * * *

[2322] "Q. Were you familiar prior to 1955 with the availability to purchase of shoe machinery made [2323] abroad, Mr. Sheppard? A. Prior to what year?

"Q. Prior to '55. A. Oh, yes.

"Q. Did you give consideration to purchasing in foreign markets such shoe machines adapted to your manufacture as you considered were too expensive on lease from United Shoe? A. Yes.

"Q. Did you make any such purchases? A. Yes.

"Q. Can you identify the machines? A. From memory?

"Q. Yes, sir. A. No, sir.

"Q. In a general way? A. Yes, sir. We brought a number of machines in on trial. Some we purchased and some we didn't. We returned and, upon another occasion, we junked some machines.

"Q. Which had been bought by you abroad. Is that what you mean? A. Yes. They were made abroad."

Mr. Carson: I think the answer is continuous.

"[2324] A. We, beginning about 1950, I suppose, we became interested in machines that were available for purchase that would be suitable for our purposes, and we tried two or three different kinds of clicking machines.

We tried several clickers made by Bata in Canada and we tried a Montreal clicker—I can't give you the name of the company—"

Mr. Carson: And then Mr. McAllister:

"Montreal Shoe Machinery Corporation.

"A. —and, I think, another one whose name I can't recall, and finally wound up by buying rather rapidly within the next couple of years a good many of these, of the Montreal shoe Machinery Company's clickers.

"Q. Did you use those to replace machines leased from United Shoe? A. Yes, sir.

"Q. Did you find them as satisfactory— A. Yes, sir.

"Q. —as the United Shoe Machines? A. Yes, sir. We did.

"Q. Why did you not replace all the United Shoe machines with foreign purchases? A. Well, we replaced, I think, all of the clicking [2325] machines.

"Q. And then how about the other types? A. Well, I'll move on to the other types now.

"Q. Yes. A. We experimented—we tried two stitchers. One was a German, a Goodyear stitcher, or similar to a Goodyear stitcher. It did the work of a Goodyear stitcher —an out-sew stitcher. That machine was unsatisfactory. We never could make it work properly in this country. And we tried an English stitcher. I think it was called Standard.

"Mr. McAllister: Standard Engineering Corporation, Ltd., to the reporter.

"A. That was a fairly satisfactory machine and is still in our plant. It is not as satisfactory as ORL.

[2326] "Q. What is the ORL? A. The United machine.

"Q. What other foreign purchases did you make? A. We made a number of both attempts and actual purchases. I'm afraid I can't, from memory right now, give you their names without referring to some notes.

* * * * *

[2330] "Q. Were you interested in purchasing shoe machinery? A. Yes, sir, since 1921, or '22.

[2331] "Q. Since 1922 you say you have been interested in buying shoe machinery? A. Yes, sir.

"Q. As far as you could? A. Well, I didn't answer yes to that one, your addition to the question, as far as we could do it advantageously and worth while.

"Q. In other words, you didn't have a policy of buying any and all shoe machinery but only such as you could buy advantageously? A. That is right, with one minor exception. I didn't bear down or insist too much on some of the little inconsequential 'pinky-doodle' machines that bore a very small relationship to our royalties and rentals total."

* * * * *

[2348] "Q. Do you remember having tried clicking machines from Montreal Shoe Machinery Company? A. Yes, sir.

"Q. Were they satisfactory? A. No.

"Q. Why not? A. I can't go into the mechanical details. They were frail and unsatisfactory. They were returned.

* * * * *

[2403] Mr. Hayes: That is all I am reading at that point.

Now, if you will turn, please, to page 133, [2404] below where it says "By Mr. Carson"—just below that referring to Mr. Cadwell, who is identified a few questions before, and this has to do with what was read in with respect to the purchase policy of Hanover, your Honor:

"Q. And had previously been with Freeman Shoe Corporation, as you stated? A. Practically all of his life he was vice president of Freeman.

"Q. As a member of the Technical Committee did he ever express to you any opinion concerning the desirability of buying rather than leasing shoe machinery? A. Many, many times.

"Q. What opinions did he express to you? A. We should make an intensive search to find outside machinery.

"Q. That you could purchase? A. That we could purchase. He practiced that at Freeman, and I think perhaps Freeman and ourselves and Weinbrenner in the men's welt industry were probably the leaders in the experimentation of trials and search for satisfactory machinery.

"Q. While Mr. Cadwell was on the Technical [2405] Committee he discussed with you that subject, did he? A. Oh, many times.

"Q. And told you what Freeman was doing? A. Well, not only during the committee sessions, and so forth, but outside of them. We kept in pretty close contact with each other, and to a much lesser extent with Weinbrenner as to, Are you trying a certain machine? How do you like it? How is it working? And so forth and so forth.

"For that reason Weinbrenner in some instances, Freeman in others, and ourselves in others did not try some

machine that the other had tried and found unsatisfactory and told us why it was unsatisfactory. There were no meetings together.

"Q. You kept in touch by telephone? A. Mostly, yes.

"Q. Who was the man at Weinbrenner that you kept in touch with? A. I can't recall. I was trying to recall when I mentioned Weinbrenner's name.

"Q. What type of machine was Weinbrenner experimenting with to your knowledge? A. A number of types, all affecting men's welt [2406] shoes. I can't name the machines. I don't know any more the crimp numbers of manufacturers."

• • • • •

Mr. Hayes: The word there is "crimp." I imagine it is a mistake, your Honor, but I don't know what to substitute for it, "crimp numbers of manufacturers."

"Q. Do you remember any names of manufacturers that you know of? A. No, I can't.

"Q. How about Sagem? Do you remember their experimenting with Sagem machines? A. Not unless his alias is Schwabe.

"Q. Would you remember Herman Schwabe talking to you about the Sagem machine? A. I don't think I ever talked to Herman Schwabe. If I did it was just a brief greeting.

"Q. What make of machine was Freeman experimenting with as far as you were involved? A. The same types of machines.

"Q. What manufacturers? A. A number of manufacturers, German machines, machines made in this country,

some English machines, but I can't possibly recall just what they were.

"Q. Can you fix the date when you first began [2407] these discussions with Weinbrenner and with Freeman? A. No.

"Q. Well, was it before or after the decision in the anti-trust case? Could you tell us that? A. Oh, it was before.

"Q. Was it before or after your 1950 discussions with the United Shoe people? A. I can't tell you that—probably not.

"Q. It was after you became president in 1940, I take it? A. I don't even—

"Q. You became president of Hanover in 1940? A. Yes. It was after then.

* * * * *

[529] Q. So this tabulation following, which I would like to describe in the record, is your analysis of your company's handling of all those United machines in that period of almost seven years; is that correct? A. This is the analysis of the 306 machines which Hanover had in its factory prior to the time they made the big purchase and which appeared on PS-4.

Q. Yes, I understand that. You started with 306 which were on Form A before the purchase of any of them October 10, 1955, don't you? A. Yes, sir.

Q. And then you took out one "economy insole channeling Model B" which was returned to United July 25, 1955. That's before the purchase. A. Yes, sir.

Q. And then you had 305 to deal with? A. Yes, sir.

Q. Then your next section of this description, tabulation, describes 19 machines returned to United on Septem-

ber 10, 1955, does it not, with the name of their [530] types? A. Yes, sir.

Q. And some of these are as in the other case, keyed by you to the type numbers in the Leidesdorf computation, are they? A. Yes, sir.

Q. Then your next entry—withdrawn.

You then subtract the 19 from the 305 and you have 286 left to be dealt with by the managment of Hanover, October 10, 1955? A. Yes, sir, that's right.

Q. You purchased, according to the notation on that date, 205 machines, leaving 81 still in the hands of Hanover?. A. Yes, sir.

Q. Then according to this entry, you returned to United October 29, 1955, 5 machines distributed between two types, which you described there? A. Yes, sir.

Q. That left 76? A. Yes, sir.

Q. Then in December 8, 1955, you returned one machine described there leaving 75? A. Yes, sir.

[531] Q. Then on February 1, 1956, you returned 10 of a one single type, leaving 65, is that right? A. Yes, sir.

Q. Then on February 7, 1956, you purchased one Skiver described there, leaving 64? A. Yes, sir.

Q. Thereafter, May 8, 1956, you purchased another Skiver leaving 63? A. Yes, sir.

Q. And then May 15, 1956, you returned one economy insole lipsetting machine, leaving 62? A. Yes, sir.

Q. Now that was May, 1956. The next month, June 8, 1956, the company purchased three machines of three different types leaving 59. That's right according to your notes, isn't it? A. Yes, sir.

Q. And one of those turned out to be a Goodyear automatic sole leveling Model D which is one of the 20 so-

called major types, and you have keyed it in to the number given in the Leidesdorf calculation? A. Yes, sir.

Q. And we had 89 left? [532] A. 59.

Q. I beg your pardon. You are quite right. 59. On June 30, 1956, according to the document, 47 were purchased by Hanover of nine different types, is that right, leaving 12? A. Yes, sir.

Q. And two of those so purchased were keyed by you to the 20 major types in the Leidesdorf calculation? A. I note that there are a couple machines here that are similar, Mr. Carson. I don't think there are nine types. There are two that are identical.

Q. You are right. There are eight types, maybe seven. Thank you.

The next transaction on the United machines was the purchase of three, August 4, 1956, of a single type leaving nine, is that right? A. Yes, sir.

Q. Then next, September, on the 10th, you purchased one more of the same type, edge trimmer, same model, leaving eight? A. Yes, sir.

Q. October 8, 1956, you purchased another edge trimmer, leaving same model, leaving seven? [533] A. Yes, sir.

Q. On November 10, 1956, you purchased a Skiver, leaving six, is that right? A. Yes, sir.

Q. And then at different dates, as you told Mr. Hayes, beginning March and ending August 1960, you returned three of the machines previously on lease, leaving three? A. Yes, sir.

Q. Then you bought two of those three, one August 10th and one August 13, 1960, leaving again the famous Goodyear outsole rapid lockstitch still on lease? A. Yes, sir, that's right.

*Extracts from Deposition of Purtell*

Q. Did you participate in meetings with management from time to time during this period of about seven years in which these different decisions were made to return the lease or the purchase? A. The only meetings that I attended were back at the beginning in 1955 when they made the big purchase, and I believe possibly in '56. Mr. Carson, when they made the second big purchase. The other single or minor purchases that were made, I didn't attend any meetings in regard to those decisions.

* * * * *

[1755] Now Defendant's Exhibit 58 in evidence—"what the discussion with Herman Schwabe was, referred to there? A. I believe that it was an Albeko channeling machine which he had in operation for a period of time. We did have some channeling knife problems with this machine and this letter was in clarification of the credit that had been extended on the knives that were being sent back and forth for evaluation as well as our requirement for additional machines to cover our production on the channeling operation.

"Q. What was your discussion with Schwabe on the subject of the Albelko channeling machine? A. I cannot tell you in particular other than the fact that it was being evaluated in comparison with the machines that we had from United, if they were satisfactory from quality as well as performance [1756] standpoint.

"Q. What did you ultimately determine with respect to the Albeko machine? A. We purchased, I don't know the quantity, but these Albeko machines to do our channeling.

"Q. And in that connection you returned the United

machine then on lease, did you, or machines? A. In that connection I believe we did return the United machines.

* * * * *

[1759] "Q. Didn't you at some time receive instructions from somebody in The Hanover Company to go into foreign machinery and see what the company could do? A. I do not recall an instruction as such. I believe that we were involved as much as anyone in the industry in the evaluation of machines and I believe that we were doing the normal amount of investigation that was going on during these times.

* * * * *

[1762] "Q. You were too busy to go into the Sagem machines as you understood that they would take quite a lot of study, is that a fair statement? A. No, I wouldn't say that entirely. I would say that the evaluation of the Sagem machines, since they already were being evaluated by someone, that we felt through relationship in the industry that we could acquire what their experience had been with [1763] those machines."

Mr. Hayes: Would you mind reading the next question and answer?

Mr. Carson: At Mr. Hayes' request:

"Q. Did you ever acquire Weinbrenner's experience on the Sagem machines while you were at Hanover? A. I am not sure of the time but I am sure that either through correspondence or by way of telephone, that I discussed some of these machines with representatives of Weinbrenner."

* * * * *

*Paul E. Spears—Direct*

[433] PAUL E. SPEARS, called as a witness on behalf of plaintiff, being first duly sworn, testified as follows:

*Direct Examination by Mr. Hayes*:

Q. Where do you reside, Mr. Spears? A. Hanover, Pennsylvania.

Q. By whom are you employed? A. The Hanover Shoe, Inc.

Q. In what capacity? A. Treasurer.

Q. Do you hold any other position in the company? A. I am on the board of directors.

Q. Do you hold any position in Sheppard & Myers, Inc.? A. Yes, sir.

Q. What position? A. I am the treasurer and also a member of the board of directors.

[434] Q. How long have you been in the employ of Hanover? A. Since May 1, 1953.

• • • • •

[544] Q. Now, I think the next one is Goodyear welt butting and tacking machine opposite which you have written in close contact with the name, "Buy them both["], but there is an additional notation in the right-hand part of the page. Will you read it? A. "Buy these machines because of capital return."

Q. You wrote those words? A. Yes.

Q. What did they mean? A. I think it meant that the number of years that it took Hanover to recover their investment. In other words, we could get our money back comparing the amount of money which we would expect to pay for the machine in two and six-tenths years as compared to the amount of royalty and rental we would have paid for the machines if we had continued leasing them.

• • • • •

[545] Q. Attached to the next, USMC wiring machine, it states "Do not buy since it is a low yield machine." A. I would presume it meant it took the company too long to return its money on the investment in order to buy it.

• • • • •

[2000] RICHARD M. CYERT, called as a witness, being first duly sworn, testified as follows:

*Direct Examination by Mr. Hayes:*

Q. Where do you reside, Dr. Cyert? A. In Pittsburgh, Pennsylvania.

Q. And what is your present employment? A. I am the Dean of the Graduate School of Industrial Administration at Carnegie Tech.

Q. Would you state your general and professional education, Doctor? A. I received a Bachelor of Science degree in economics at the University of Minnesota, Ph.D. in economics at Columbia University.

Q. You graduated with highest honors from the University of Minnesota? A. Yes.

Q. In 1943? A. Yes.

Q. You belong to Phi Beta Kappa and Beta Gamma Sigma? A. Yes.

Q. Now, would you state for the record, please, what your teaching experience has been in the economics [2001] field? A. Well, I have tried a variety of courses in economics. The range has been from elementary economics at both what the economists call micro and macro level, the study of the firm, and the household, and also the study of the economy as a whole; I have taught graduate courses, Ph.D. courses in economic theory, I have taught

a first year graduate course to Masters students in the economics of the firm; in addition, I have taught several courses in managerial economics.

Q. At what institutions did you teach? A. Well, most of my teaching has been at Carnegie Institute of Technology. I taught a couple of summer sessions at the University of Minnesota, and while I was a graduate student at Columbia I taught at City College of New York.

Q. Have you been the recipient of a Ford Faculty Research fellowship? A. Yes, I have.

Q. Have you been director of any project for the Ford Foundation? A. I have been director of a project that we had running at Carnegie Tech for about the last five [2002] or six years which we called the behavioral theory of the firm, the funds have been contributed by the Ford Foundation, the project has been run at Carnegie Institute of Technology. I have published a number of articles as a result of that research and there is a book coming out in April of 1963 published by Prentice-Hall.

Q. And during the time at Carnegie Institute, have you gone through the usual steps of assistant professor and professor and head of department, and so on? A. Yes, I actually started as instructor since I went there before I had my Ph.D. and went through the ranks to professor, and in February of this year, 1962, I became the dean of the school.

Q. I assume you had the usual war service? A. Yes, after my undergraduate degree, I went into—in 1943, I went into the Navy and I was in the amphibious forces during the period 1943 to '46.

Q. Now what are the professional societies of which you are a member? A. Well, I belong to the American

Economic Association, the American Statistical Association, the Econometric Society, and the Institute of Manage- [2003] ment Sciences.

Q. Have you had any activities as a committee member or otherwise in connection with those associations? A. Yes, I have been a member of the committee established by the American Statistical Association on the use of statistical techniques in sampling; I have been chairman of the Research Committee of the Institute of Management Sciences, and I was elected a year ago, I believe, vice-president of Research and Education of the Institute of Management Sciences.

Q. Have you done any consultation work with industrial firms or related firms? A. Yes, over the years I have done a variety of consulting, that has been encouraged at Carnegie Tech, we are limited to one day a week. Our feeling is that this does aid in teaching.

I have had relationships which have lasted over the years with a consulting firm, originally, Touche, Mann, Bailey & Smart, now called Touche, Ross, Bailey & Smart. I currently do consulting for them. I am a consultant with Gulf Oil. Over the years I have done jobs for a variety of firms:

Pittsburgh Plate Glass, Federated Department [2004] Stores, Fruehauf Trailer, Chrysler Corporation, Kaufman Department Stores—Kaufman's Department Store in Pittsburgh, Gimbel's Department Store in Pittsburgh, I am sure there are some others.

In addition, I have been a consultant to the Air Force and also to the Post Office of the U. S. Government.

Q. Was one of the other firms for whom you did consulting work the Mellon National Bank? A. Yes.

Q. When were you first consulted by my firm in connection with this case, Dr. Cyert? A. I believe it was in July of this year, July 1962.

Q. And in the course of your retainer, have you examined the Leidesdorf reports that have been marked in evidence here? A. I have.

Q. Marked Plaintiff's Exhibits 37, 41, 42, 43 and 46. A. Yes.

Q. Have you, in addition, been supplied various other exhibits by us since the trial in Scranton? A. Yes, I have.

[2005] Q. And you were present in the courtroom, were you not, during the testimony of Dr. Corson? A. Yes, I was.

Q. And you have examined Defendant's Exhibits 47 to 52, which were put in evidence, I believe, during Dr. Corson's direct testimony last week, have you not? A. Yes, I have.

Q. And have you since then—and I think it was last night, if I recall correctly—examined the exhibits which are now marked Defendant's Exhibits 79, 80 and 81 and Plaintiff's Exhibit 77 which has just been marked? A. Yes.

Q. Did you hear—I take it you did hear—Dr. Corson express criticism on the Leidesdorf reports, or calculations, on three main grounds, to wit, the failure to give effect to cost of capital; two, the failure to give effect to future worth of investments; and three, the failure to give effect to taxes; is that right? A. Yes, I did; yes.

Q. And in the light of your examination of the various exhibits that were put in through Dr. Corson, and your study of Dr. Corson's testimony, can you tell [2006] us

what in your opinion is the relation between the terms "cost of capital" and "future worth of investment" as they were used in the Corson calculations. A. Well,—

Mr. Carson: I object to that as unnecessarily obscure. It seems to me to be the prelude to a statement by the witness.

The Court: Sustained. I think maybe you can reframe your question, Mr. Hayes.

Q. From your study of the exhibits put in there through Dr. Corson, did you note any relationship between cost of capital, as used by Dr. Corson, and future worth of investment as used by Dr. Corson? A. Yes.

Q. And what relationship did you discover? A. Well, the figure that is deduced as I believe the absolute minimum cost of capital by Dr. Corson is then used to determine through a compounding procedure, the future value of net streams both of net leasing and of ownership. In other words, these are compounded for 17 years using a 14 per cent rate of interest, which is the figure which is determined as a cost of capital.

Q. Now, is the expression "cost of capital" one [2007] that is currently in use among economists? A. Well, the cost of capital is a term that is in use and has been in the theory for some time. It is only recently that attempts have been made to actually measure the cost of capital. If I might just, to establish this point, and perhaps clarify it, I think a statement by Ezra Solomon in the book which was used earlier, "The Management of Corporate Capital,"—Solomon is the editor and he also has an article here—this article was published in 1955—

Q. Will you give us the title of the book? A. The title of the book is, "The Management of Corporate Capital."

Q. That is one of the books that Dr. Corson referred to, is it not? A. Yes. Ezra Solomon, who is the editor of the book, was in Chicago at the time. He is now at Stanford:

> "Although the concept of cost of capital—"
>
> Mr. Carson: May we have the page?
> The Witness: 129.

A. (Continuing) "Although the concept of cost of capital has always been made a central part in the [2008] theory of capital the problem of defining and measuring this concept has received almost no attention at all. Quite apart from the practical difficulties of measuring capital cost for a specific company, there is today no explicit and generally acceptable account of what is the correct concept, actual approach to its measurement."

Then skipping a little bit:

> "The best known exception is the work of Professor Joel Dean, but even his most comprehensive statement regarding the cost of capital is neither explicit nor complete."

And there is a footnote then to Dean's study on "capital budgeting" and two other discussions.

[2009] Q. Would you say that this is a relatively new idea, this idea of measuring cost of capital—relatively new among economists, I mean? A. Yes. This piece of Solomon's was published in 1955 and, as you see here, he said, and I agree, that there has been almost no explanation of any attempt to measure the cost of capital.

Mr. Carson: Could I have the question and answer read?

(Record read.)

Q. As economists use the term "cost of capital," what is the purpose that they have in mind?

Mr. Carson: Objected to, your Honor. I don't see how he can tell what different economists have in mind.

The Court: Yes. Sustained.

Q. What is your interpretation, Doctor, of the concept of cost of capital? A. The cost of capital generally refers to a relationship between anticipated earnings and stock prices. Let me, if I may, quote a couple of definitions to indicate the general usage.

The first is—

Q. Would you identify the book? [2010] A. The first is from a book named Managerial Economics by Neil E. Harlan, Charles J. Christenson and Robert F. Vancil. They are all from the Harvard Business School.

Q. What page is that? A. Page 260 and page 261.

"The preceding paragraphs consider how a fixed capital budget should be spent, but how should the size of that budget be determined? To answer this question, we must introduce the concept of the cost of capital. The cost of capital to a company is the rate of return expected by investors on capital funds they place at its disposal."

Then there is a paragraph that is irrelevant.

"While the definition of cost of capital might seem perfectly clear on a conceptual level, there are a host of difficulties in determining it in practice. Most of these difficulties center around the problem of measuring the 'cost' of common stock financing, since shares of common stock do not carry a fixed rate of return as do bonds and shares of preferred stock. The whole topic of cost of capital is currently an area of [2011] great controversy among finance specialists. This controversy is beyond the scope of this book."

There is a quote that I could pick out of Dean which defines the cost of capital in essentially the same way.

Q. What is the date of the imprint— A. 1962, Managerial Economics, April 20, 1962.

Q. What is the Dean book to which you referred? A. The Dean book is 1951. This is called Managerial Economics also.

Mr. Carson: May we have the Dean identified?

Q. Joel Dean, is it not? A. Yes, Joel Dean.

Q. In your opinion, is the cost of capital as used in the fashion in which you have explained it to us a cost in the accounting sense? A. No. I would like to elaborate on this a moment if I could because I think a great deal of confusion has been generated in the courtroom by the way this term, cost of capital, is used.

The notion of cost of capital is used and attempted to be measured to serve as a guide to management in a capital budgeting procedure. It is not a [2012] cost in the sense that one pays out some money equivalent to this

particular rate. It is a managerial guide and a number of companies, for example, have used a variety of devices to guide themselves before the notion of trying to measure cost of capital was developed.

I don't know whether we want to go into that at this point, but there are a number of companies, for instance, who have tried to improve the efficiency of their investment by using certain cutoff rates where they say, "We want our investment to achieve this minimum," so that that cost of capital is not some sort of magical thing and we are not really dealing here with witch doctors; this is a guide—it is an attempt to measure something and then to try to use it as a guide.

It does not in any sense represent money paid out.

Q. Cost in the accounting sense? A. It is not a cost in the accounting sense.

Q. As I understand it, your testimony is that there is no general acceptance that you are aware of in your capacity as an economist and in your relationship in the economic fraternity—

[2013] Mr. Hayes: I better have that over again.

Q. I will start over again. As I understand your testimony, there is no general acceptance among economists that you have ever heard of as to how to measure this concept of cost of capital?

Mr. Carson: Objected to as leading.

The Court: I will take it. Overruled. Go ahead.

A. There is no general, accepted procedure. This is an area that is under controversy. If you take a look at the Solomon book, almost every article in there will have

some reference to the fact that this is difficult to measure.

As a matter of fact, a great many of the articles there are attempts to put forth different versions of trying to get at a part of this problem. As I read, the Dean attempt, which in a sense was an early one and was fairly detailed, is, in Solomon's view, at lease, incomplete and I will have some things to say about that, I am sure, as we go along.

Q. Would you elaborate a bit on the statement you made, Doctor, that this concept of cost of capital is one which is generally used, when used, as a guide to management? I think that is the language you [2014] used. A. Yes. Let me do this perhaps with reference to some of the things that have been said in this courtroom.

The Court: Do you want a recess or do you want to go right through today? Off the record.

(Discussion off the record.)

The Court: We will take a brief recess.

(Short recess.)

Mr. Carson: May we approach the bench, your Honor?

The Court: Yes.

(Discussion off the record at the bench.)

*By Mr. Hayes:*

Q. Do you remember the last question? A. Yes. You wanted me to elaborate on your earlier statement.

The cost of capital is what I would call a guide to management. It is a guide in the following sense: That the

firm may have a number of investment opportunities before it and it may have some problem of determining how much of its funds, for example, should be used for investment in a particular year. The cost of capital, as a guide, then, might indicate [2015] that, let us say, all those investments that it has anticipated will earn less than the return indicated by the cost of capital might be eliminated, and funds should be allocated only for the projects that would earn something equal to the cost of capital or above.

This is, as I say, a rough way in which this might be used as a guide. Unfortunately, in the real world, as I say to my students, this doesn't work out quite as easily because of the fact that there are different degrees of certainty and uncertainty with respect to particular investments, and when I say, "as a guide," I mean it is a guide and I don't mean it is a rule.

I don't think we are to the point yet in management where we can turn the management job over to a computer. We have made some strides in that direction but I wouldn't say this is an area in which we can do that.

Therefore, there may well be, when you are using the cost of capital as a guide—you may well make some investments, for example, that have a certain degree of certainty and a prospect of greater return that is less than the cost of capital and, at the same time, this may be balanced by some investments [2016] that are perhaps riskier but that have a higher anticipated rate of return, so that it is only a guide, and a rough guide.

If we ever get to the point where we can both measure the cost of capital accurately and meaningfully in such a

way that everyone agrees and we can also predict accurately so that we can get all of the data on prospective investments, then perhaps the whole problem of management with respect to investment will be simple, but it is not in that state now.

Q. You said that it was a guide and not, in substance, a determinant for management's decision? A. Yes.

Q. Are there other guides that management uses in making decisions with respect to whether to invest? A. Yes. There are a number of other guides that are used in a similar fashion, or you might say techniques. The most common one is probably the payback period.

Q. Would you explain that to the Court? A. The payback period, in its simplest form, would take the savings on a prospective investment and divide it into the cost of the investment. The resulting figure would show the number of years in [2017] which the investment would bring back its capital. It doesn't take account of any rate of return. It is a simple rule of thumb, but businessmen are simple and they are dealing with complex things and this is the way all of us proceed when we are dealing with complex factors; we have to get some rules of thumb and the payback period has been criticized severely by a number of people and there is some substance to the criticism but on the other hand there is also some value in it, one of the factors being that a short payback period is one of the ways in which management hedges against uncertainties.

If you have a short payback period, it means O.K., you are going to get your money back and if something happens, O.K., you have gotten out safely. There are a variety of other—

Q. Before you go to the variety, take this payback method in its simplest form; when that is used is any effect given to the tax consequences? A. No. This is usually gross. That is, it is savings before taxes.

Q. How would you apply it in the situation where a firm, such as Hanover—you are acquainted with the financial statements of Hanover? [2018] A. Yes.

Q. —had to elect between buying the machines, if they were available for purchase, let us assume, in 1939, and continuing to lease—how would the payback method operate? A. What you would do would be to take the amount of money that you were going to invest in machines and you would then try to compute what you would save over leasing—in other words, what you would save on leasing charges, taking into account any additional items you would pay if you owned.

Presumably, insurance and service would be additional costs if you owned. You would take the leasing charges that you would pay, subtract the additional cost to try to get a measure of what the savings would be by owning and then get this—what you would try to do would be to get the annual saving and divide this into the cost of that investment.

Q. And you would make a projection into the future, in effect, as to buying against leasing? A. Yes. What you would do is say, "This is what I am going to save annually," so that you are assuming that these savings are going to continue for a period of time.

[2019] Q. That is the payback method in its simplest form? A. Yes.

Q. Are there variations of that? A. Yes. There are some in which you, for instance, might subtract from

the savings interest that you might pay for the money that you would be paying out for your capital. There have been some attempts by a fellow by the name of Grant to tie this into a more complex method which he uses.

I wouldn't attempt to make an exhaustive category of all the variations of the payback method.

Mr. Carson: Could I have the first part of that sentence read?

(Record read.)

Q. I show you, Dr. Cyert, Plaintiff's Exhibits 52 and 53, which are headed "Cost of purchasing United Shoe Machinery machines compared to leasing-interest on borrowed capital," and in the case of Exhibit 52 it is at 6 per cent, and in the case of 53 it is 2 percent.

You have examined those exhibits, have you not? A. Yes, I have.

[2020] Q. Would you describe those exhibits—would it be accurate to describe those exhibits as a use of the payback method, taking into account interest at two different percentages? A. Yes. The final calculation has not been carried out but this is preparatory, I believe, to the calculation.

Q. Doesn't it show the credits and the balance? A. It shows the credits and then the balance and one could carry through to the final calculation.

Q. What would be the final calculation? A. To take the net savings and divide them into the cost of purchase.

[2021] Q. Has there also been advanced another guide to management, which takes account of obsolescence? A. Yes. George Turborgh, with—

Q. Will you spell that name? A. T-u-r-b-o-r-g-h.

Turborgh has a method which is basically a variation of another method, the annual cost method, which is an attempt to take into account the obsolescence of machines. There is an attempt to estimate annually the obsolescence of machines and use this technique to try to determine when a machine should be replaced.

Q. Has that been used extensively? A. My understanding—this based partly on conversation with Turborgh and partly on some of the complaints he has in his writings—that it has been difficult to get businessmen to adopt this particular technique. It tends to be a little too complicated in its required calculations. Also the obsolescence factor is a little bit like the cost of capital; there is difficulty in agreeing on what is the obsolescence, how to measure it. Turborgh thinks he can measure it accurately but other people are not quite as certain of this.

Q. Your mention of his writings reminds me, [2022] Doctor, that I forgot to ask you one question in connection with your qualifications, and that is, have you been the author of any books and articles? A. Yes.

Q. You mentioned one that is to come out next year? A. Well, I have written a fair number of articles. My guess is in the neighborhood of 25 to 30 articles.

Q. Will you mention some of the publications in which they appeared? A. I have published in the American Economic Review, Quarterly Journal of Economics, Journal of Political Economy, Journal of Business, Econometrica, Management Science, Administrative Science Quarterly, Behavioral Science.

There is a Canadian journal, Cost and Management, I think it is.

Q. Well, that is enough. You have written widely. A. They have been the major journals in economics and I would say in management and I might add that I have done some articles for the Journal of Accountancy and for the Accounting Review.

[2023] Q. How about books? A. I have two books now published in the field of statistical applications to accounting—it is really statistical sampling techniques in accounting. There are two books. I have this one, Behavioral Theory of the Firm, that is coming out in April. I have another one that is now in draft which we are hoping to have published in December of this year. We may not make it.

Q. In each of your books you have had co-authors? A. Yes.

Q. Is that largely true of many of the articles you wrote? A. Yes. This, incidentally, is characteristic of the way we work at Carnegie Tech. There is a tendency to be fairly inter-disciplinary and there is a real encouragement that existed when I was a faculty member and that I am now pushing also, for people to work together, especially when they come from different disciplines.

Q. You have mentioned various approaches as guides to management. You have mentioned the cost of capital, which has been used in this case by the [2024] defendant; you have mentioned the pay-back and variations of various kinds, without elaborating on them, the pay-back, and you have mentioned the Turborgh method—in your

experience, which is the most common and which is the least used of those methods? A. Well, I think probably, by all odds, the pay-back method is probably the most widely used. In terms of actual practice, so far as I know, no one is really using the cost-of-capital notion. I don't pretend to know every firm in the world, but I do not know as of now, unless maybe it is United Shoe, anyone who is using a cost of capital notion is setting up its—as a guide in setting up its investment policy.

Mr. Carson: What did the witness say after "I do not know as of now"?

(Record read.)

Q. And all of these methods are, as I understand your testimony, guides to management? A. Yes. I would like, if I could, just to elaborate on that briefly, because I think it would be useful to get a little elaboration on it and I would like to use the Harlan and Vancil book as a help. [2025] They go through a particular method which they start out by saying:

> "This section introduction is not intended as a comprehensive treatment of the subject of capital budgeting. It's purpose is, rather, to set forth an analytical approach which will help in the solution of capital expenditure problems within the business framework in which they arise. The approach suggested here is not the only acceptable one; and no effort is made to defend it as being superior to all others."

And they go on:

"Capital expenditures may be classified into three major types, depending upon the nature of the economic justification supporting them. The first two types are similar to classes of decisions we have already considered: (1) Expenditures made to reduce costs, and (2) Expenditures made to increase revenues. The third type includes expenditures justified on non-economic grounds. Often a single project will contain elements of two or even all three of these types of expenditures."

[2026] This is why I would like to emphasize the notion of a guide. There isn't any single technique or combinations of techniques which one can wrap together in some way and say that this is the way you make the decision. These things have a variety of elements in them and I have seen companies make an investment where they knew they were not going to get any return.

In fact, all of the steel companies—we have made a study of capital budgeting—all of the steel companies have a category which they call "investment necessities." Sometimes they divide them up between sales necessities and production necessities, where they say, "Basically this is an investment and we must make it if we are going to stay in business."

This is the kind of thing that might happen if a competitor came out with a machine that gives you a better product and better quality and the price and everything else is the same; and this is the kind of machine the company has to invest in if it is going to stay in this business.

I saw a case where a company had to move its plant from Pittsburgh to Bridgeport and they had [2027] to do

this because their competitor had done it, in order to give better service. In all cases there are varieties of expenditures, varieties of criteria, that come in and this is where the problem of business judgment must be used.

Q. Now lets get down specifically to this cost of capital. You mentioned already that there is great controversy as to how it should be determined; how it should be approached. What are the elements that are used when an endeavor is made to measure cost of capital? A. Well—

Mr. Carson: Objected to. The witness said he doesn't know in any case except United Shoe.

Mr. Hayes: To use the method as a policy.

The Court: What is the question, please?

(Question read.)

The Court: Overruled.

A. The usual attempt I think is to try to break down I think the type of capital, the various areas of capital as I believe Dr. Corson correctly pointed out into debt, equity, and retained earnings, and then to try to get some kind of measure which is forward-looking. At least on the equity, on the debt, [2028] there is no problem. No one has any great difficulty with measuring—

Q. Will you explain why, Doctor? A. This is actually —I think I read something on it earlier. This is because the rate of interest is affixed or explicitly stated at least on debt capital.

Q. You mean by that that when funds are obtained for an investment on a basis of debt that is your cost of capital, the interest that is paid? A. Right. Right.

Q. Proceed. A. On the—the big problem on this is the common stock, the equity capital. It is—what you need for a useful figure for cost of capital is something that is forward looking. The attempt, in other words, has to be to try to anticipate what the requirement—what rate of interest would have to be earned, what rate of return would have to be earned on this capital to get additional funds to that you are trying to anticipate earnings on the equity capital.

You see, if it is going to be useful it has to be forward looking, and the other problem is [2029] the retained earnings. It is not at all clear, you see, as to how the retained earnings—what the proper policy is toward retained earnings.

If I might again just use Dean on this, he puts it I think better than I can in terms of just remembering what he refers to as the so-called plow-back, a plow-back of earnings, which I think gets at the point.

> "The importance of retained earnings as a source of capital funds makes a plow-back policy an integral part of a firm's capital expenditure budgeting."

He said:

> "One guide to plow-back policy is that outlined by the capital rationing theory set forth in Section IV of this chapter. If a company follows this plan faithfully, it retains earning (up to the limit of a stockholder rebellion) as long as they can be invested at a return higher than the firm's cost of capital (e.g. 15 per cent). It pays out earnings that cannot be invested internally (either now or in the future) to beat this cost of capital rate."

[2030] This is one guide, and this is, I believe, a guide that Dr. Corson referred to. And what I'd like to point out is again there isn't any ironclad rule about what a guide is.

> "Another guide is suggested by the theory that dividends in the modern corporation are a kind of interest income (although more uncertain than contractual interest) if a plow-back policy is determined by this theory (which is set forth in more detail in Chapter I) then retained earnings would be a highly volatile residual left after paying stable dividends out of fluctuating earnings."

In other words, there you would pay a stable dividend, whatever the residual was after your earnings would be kept in the firm.

> "A third guide to plow-back policy is found in the notion that a certain percentage of earnings should be held back for contingencies and for growth. This is a long-run view of an average minimum amount of plow-back that would rate a prior claim on earnings over an integral business cycle."

So there isn't any single policy about how [2031] you handle retained earnings, how you determine what they should be, and therefore it becomes again difficult to argue what the cost of capital is on that.

Mr. Carson: Excuse me, may I have the title of the book, the year and the page the witness read from?

The Witness: I am sorry, "Managerial Economics" of Dean. This is the only book of Dean's that I have referred to.

Q. And the page number? A. The page number is 572 and 573.

Mr. Hayes: I think the year 1951.

Mr. Carson: He said that.

The Witness: Yes, whenever I say Dean, it will be the "Managerial Economics". I don't know whether I will refer to it any further or not.

Q. Now proceed as to how when the cost of capital is used, and what procedure is followed in attempting to arrive at the cost of capital of a company's stock. How would you go about it? A. There just isn't any single way that you go about it. This is the problem. Certainly—

Q. Well, suppose the company had stock out- [2032] standing on the market, take that situation, publicly held company. A. Well, if we had a publicly held company, one of the first things that one would try to do would be to look at the market to try to take a look at—to really try to predict what the stock was going to do over the—over the future. One of the things that one might do on this is to forecast the trend of earnings and say—looking at the past, this is where the trend of earnings might go toward the future. It is an attempt—you have to attempt to be forward looking in this thing.

Q. Well, would the market value of the stock come into the calculation? A. The market value of the stock would certainly come into the calculation, and further, what you would be attempting to do would be really through an anal-

ysis to try to look at the way in which the price of the stock was going to vary.

Q. And would an examination be made of the relation between the earnings per share and the price per share that the market placed on the stock of the company? A. This would be an element that would be [2033] important to examine, not—I want to emphasize—it is not the answer, you just don't make a measure of this and say this is the cost of capital. This is an element in the whole procedure of looking forward.

Q. But there would be a price earnings ratio based on the earnings per share and the market appraisal of the stock which would enter into the determination; is that correct? A. I would say that is correct in those cases where someone has the courage to try to measure this.

Q. Now, suppose a company was seeking to use the cost of capital method but it had no public market for its stock. What is done then? A. Well, I would—I think I would go along with—

The Court: May I ask this question:

What did you mean by your question, suppose a company was seeking to use the capital stock method?

Mr. Hayes: Cost of capital method, I should have stated.

The Court: For what purpose?

Mr. Hayes: For the purpose of a company to [2034] make an investment. That is what I intended to say.

Thank you, your Honor.

I should have included that in the question.

Mr. Carson: Could we have the witness' answer so far read.

The Witness: I don't think I have answered it yet.

(Answer read.)

The Court: I guess I caused all this trouble. All right.

Q. Will you start all over again, Doctor? A. What I was going to say is, I think I would go along with Dean on this, that probably the most reasonable kind of approach would be to try to get some companies that were in some sense similar to this company that were publicly held.

Now I'd like to point out that again that's easy to say, but in the real world again, companies aren't twins. Unfortunately, they just don't appear that way, and there are always something that are different. But again if you are going to be satisfied with a gross approximation, this would be one way of at least proceeding.

[2035] Q. And now take a situation, the third one I give you, again, if you desire to use the cost of capital approach in determining whether or not to make an investment, and the company you are looking at has no public market for its stock, and the statistics of no comparable company are available. A. Well, if you want an honest answer, I would throw up hands. I don't see how you can compute anything that's meaningful.

Q. Now, do you have before you, Dr. Corson, Defendant's Exhibit 47 for identification—

Mr. Carson: You mean Dr. Dean, don't you?

The Witness: You are going to have to get your sides split. We are going to have to start wearing numbers. You called me Corson.

Mr. Hayes: I don't quite—

The Court: You called him Corson and there is an objection.

Mr. Hayes: I see. I called you Dr. Corson.

Mr. Carson: You meant Dr. Dean, didn't you?

Mr. Hayes: No, I meant Dr. Corson.

The Witness: We are going to get numbers for the uniforms.

Mr. Hayes: Yes, names and numbers for all [2036] the players.

Q. Defendant's Exhibit 47, Doctor, do you have it before you? A. Yes, I do.

Q. You may recall that Dr. Corson testified as to Table I of that exhibit, that the last column, which was the earnings per common share, divided by the price at which the common shares sold represented in those years the cost of capital to Hanover, and he arrived—it doesn't appear on the schedule, but he testified to weighted average of 22.14 per cent, cost of capital to Hanover as determined on that table.

Do you remember that testimony? A. Yes.

(Pause.)

Mr. Hayes: I am sorry, your Honor, for this delay, but this is part of the late last night's work.

The Court: That is all right.

Mr. Hayes: Would you please mark as Plaintiff's

Exhibit 90 for identification seven sheets showing for each of the years which appear on Defendant's Exhibit 47, to wit, 1940, '41, '42, '48, '49, '50 and '51, the shares sold, split between sales to family [2037] and sales to employees.

(Plaintiff's Exhibit 90 marked for identification.)

Mr. Hayes: Would you have any objection, Mr. Carson, to Plaintiff's Exhibit 90 being marked for identification subject to the subsequent testimony of Mr. Spears who prepared it?

Mr. Carson: Well, we have marked it.

Mr. Hayes: Marked in evidence, I mean.

Mr. Carson: Marked in evidence?

Mr. Hayes: I didn't want to hold up Dr. Cyert by putting Mr. Spears on to testify.

Mr. Carson: May we go off the record a minute.

Mr. Hayes: Surely.

(Discussion off the record.)

Q. I call to your attention, Dr. Cyert, Plaintiff's Exhibit 80 for identification—

The Court: Excuse me, it is 90, isn't it?

Mr. Hayes: Yes, it looks like an 80 on it.

The Court: It is my fault. I wrote on it.

Mr. Hayes: I am trying to make myself popular, your Honor.

Mr. Carson: We have gone much further than was [2038] realized.

Mr. Hayes: Would you kindly mark for identification single sheet entitled, "Reconciliation of

Capital and Surplus per Balance Sheet to Book Value of Common Stock used to Determine Sales Price of Common Stock Sold from 1940 through 1951."

(Plaintiff's Exhibit 91 marked for identification.)

Mr. Hayes: You may recall, your Honor, that during the cross-examination of Dr. Corson I mentioned to him a certain stockholders agreement. I don't happen to have them right now, so for the purpose of my question I am going to state the substance. As a matter of fact I will need to call a witness with respect to the arrangement with the employees.

I just have one copy.

The Court: You may use it. If you only have one copy then use it.

Mr. Hayes: I have only the one, yes. I beg your pardon, we do have copies. This is one of the agreements.

Will you mark that for identification, please.

(Plaintiff's Exhibit 92 marked for identification.)

[2039]

Q. Now you have before you, do you not, Dr. Cyert, Plaintiff's Exhibit 90 for identification which lists sales to members of family and employees for each of the years where the sales were made—sales of stock were made according to Defendant's Exhibit 47? Do you not, Doctor? A. Except for 1948.

Q. You don't have 1948? A. No, it goes to 1949, '50, '51.

Mr. Hayes: We do have it.

The Witness: Well, let me make sure.

Mr. Carson: I don't have a '48 either.

The Witness: Maybe it was a bad year.

The Court: The original has a '48.

The Witness: I have one now with '48. Charlie gave me one.

Q. Now you do have it complete, do you not? A. Yes.

Q. And in addition you have before you Plaintiff's Exhibit 91, which is the reconciliation of the capital stock and surplus per balance sheet to book value of common stock used to determine sales price of common stock sold from 1940 through 1951? [2039-A] A. Yes.

Q. Now you have before you also, although I don't think you have ever seen it before, Plaintiff's Exhibit 92 for identification? A. Yes.

[2040] Q. Let me tell you in substance that as a special meeting of the stockholders at which Exhibit 92 for identification is the minutes, there was approved an agreement among the then existing stockholders, all of whom were members of the Sheppard and Myers family, the company having been originally started by two men, Mr. Sheppard and a Mr. Myers, and under the terms of this agreement they contracted, and the corporation was a party, speaking again in substance, that no existing stockholder would sell stock to any outsider without first offering it to the stockholders who had a certain period of time, if I recall rightly, thirty days to decide whether they would buy or not, and that any portion of the offered stock not purchased by the other stockholders would then be offered to the corporation for purchase.

The corporation had a further period, I think again of ninety days, and I speak subject to correction, in which to purchase stock, the stock that was offered and not yet taken by the other stockholders, and only if neither of the existing stockholders nor the corporation purchased could the stock be sold to an outsider, and, further, it con- [2041] tained this agreement, which was attached to the minutes and made part of it, on the second page—third page from the last of Plaintiff's Exhibit 92 for identification—contained a formula which was to be applied in arriving at the value of the capital stock of the company in the event of any sale.

Do you have that before you, Doctor? A. Yes.

Q. And in substance it was that the sales price would be the value, the book value of the company, assets less liabilities, except that inventories of materials and merchandise were to be taken at 85 per cent of the book value.

Now, further keeping that in mind, if you will look at Plaintiff's Exhibit 91, you will see that in each of the years preceding the years of sale, and Hanover, the evidence is, was on an annual basis—the balance sheets were at the end of each year—that is, for the 1940 sales, if you look at the 1939 statement—there is set forth here the equity at the end of the preceding year, the adjustments for 15 per cent of inventory, and 15 per cent of supplies, an adjustment which appears in only the first three years for the reorganization expense, an adjustment [2042] which appears only in the year 1940 for prepaid rent, and to deduct current liabilit es in the year 1940, and also in the last four years there is deducted from the equity the $2½ million worth of preferred stock that were outstanding.

And you will notice in each instance the book value at the bottom is arrived at and the number of common shares of stock outstanding and the value per share, and it agrees in each instance with the prices which appear in the fourth column of Defendant's Exhibit 47, except that in the year 1940, when, according to Defendant's Exhibit 47, the stock was sold for $40, the book value was calculated on Plaintiff's Exhibit 91 for identification was $40.26. A. There is something wrong here.

The Court: 86 cents, isn't it?

The Witness: The years up there are incorrect.

Q. No, in each instance they are the year before the year in which the sale took place. A. So the $40.26 is really for the 1940, the $40.86, which represents 1940, is the sale price for 1941?

Q. That's right. [2043] A. Right, O.K.

Q. It was the preceding year's balance sheet, because I think the evidence in this case shows that Hanover balanced their books only at the end of the year, and had financial statements only at the end of the year, at least during this period. A. Yes.

Q. Now, Dr. Cyert, keeping in mind the information which is contained in Plaintiff's Exhibits 90, 91, and the substance of what I told you with respect to Plaintiff's Exhibit 92, in your opinion does the sixth column on Defendant's Exhibit 47 indicate the cost of capital to Hanover? A. No, not by a long shot. It is obvious in this case, I think from what I said, from what I have read, that what we have here are some prices which are artificial, which are not market prices, so by taking the earn-

ings per share over these particular prices, I don't know what you get.

It is obvious that you get something that is—it is obvious to me, at least, that you get something that's artificial because these prices are not market-determined prices. They are artificially determined prices made up for the purpose of selling [2044] within the group of stockholders as was read.

Take a look at 1948, for instance, the notion that you'd have a rate of earnings of 54.5 per cent would indicate that something is peculiar here. I want to make it clear that I am not an expert on the stock market, but I do follow it to a limited extent, and I don't know of any situations myself in which earnings of something like 54.5 per share.

In other words, you see, this is a—this is a peculiar situation. This is a company that is a very solid company, if you look at its balance sheet. It is a company that has a good earning record, it is a company that has plenty of current assets.

The idea that the price would be twice earnings is—I guess incomprehensible is the best word.

Now, the only way it does make sense is in the light of what we talked about, namely, that this is an artificial price, so that it does not represent market price. Therefore, it does not seem to me that this calculation, the calculation using earnings and price to get this rate of earnings is [2045] meaningful in terms of any kind of notion of cost of capital.

In 1948, the cost of capital to Hanover was not 54.5 per cent. If they wanted to get money they would not

have to pay 54.5 per cent to get it. If they wanted to raise it in the market, they would not have had to pay it. I am willing to say that categorically.

Q. Now, will you look at Table II, which is the third page of Defendant's Exhibit 47, and we have there in the third column a rate of return which is the percentage that the—well, the equity divided into the net profit after taxes to find a rate of return on the overall equity. A. Yes.

Q. With varying percentages and Dr. Corson testified that they averaged out or a weighted average—I have forgotten which he said now—to 14.1 per cent.

Now, in your opinion, is the rate of return as determined on Table II of Defendant's Exhibit 47 in evidence a measure of the market appraisal of the stock of Hanover or a measure of the cost of capital to Hanover? [2046]

A. No, this is a—this shows just what it says, namely, that it is the rate of return, namely, taking profits over equity. It does not have any relationship to stock prices, that is, 32.59 rate of return doesn't mean to say that the stock should sell for three times the earnings or something like this.

What it—this is a calculation. The calculation is what that is, is what is represented there. It doesn't again indicate the cost of capital in the sense that this is what the company would have to pay, any one of these figures; it is what the company would have to pay for additional increments of capital.

Let me try to elaborate on another point which has been bothering me in terms of the testimony here.

Let's take the 32.59 in 1947. It is a high rate. Now, one of the bothersome things here which I think should be

straightened out or at least there should be some discussion on at least this, that there is a tendency when one, for instance, takes a weighted average here and comes out, let's say, with 14.4 per cent, there is an assumption that is implicit that I don't think is valid or at least I'd like to have [2047] some evidence that it is before I would be willing to accept it, and that is that there are an unlimited number of investment opportunities in the company at this rate, that is, that the company can keep putting in money—investing money in its own company and get 14 per cent.

This is a confusion of what I would call an average and a marginal concept. It is the marginal concept that the economist is after when he is talking about cost of capital, namely, what is the incremental return, what is the incremental cost, that is, to get an additional amount of capital what will it cost you?

The idea that the company is such that you can keep putting in blocks of capital and getting that same return, you see, implicitly assumes that there is no diminishing returns to capital. It is—well, it is like the situation where—this isn't an exact analogy, but I think it makes the point—when we are trying to explain diminishing returns in an elementary economics class, we generally present it this way.

Suppose you have an acre of ground, a certain amount of seed and you have one farmer. You invest one farmer, in effect, and he gives you a rate of thirty bushels.

[2048] Now you invest another farmer. For a while you might actually get an increase. At some point when you keep adding farmers here you are going to begin to

get a decrease in your return, and this is what happens when you are investing capital in a company also. You don't just keep investing money and getting the same return with an unlimited amount of funds.

So that there is a point where the marginal return will differ from the average return, and there has been an implicit assumption all through the proceedings here, I feel, that the average—that this return is somehow constant, that there is no such thing as a falling marginal return.

Q. I have noted, Doctor, that on examining Table II the more money the company makes on its equity—let me put it this way. I will withdraw that.

Examination of Table II seems to suggest to me at least that the more money the company made on its equity, the higher its cost of capital, and the less it made, the lower its cost of capital.

Now, do you read the Table II in that fashion and, if so, what is your opinion concerning it? [2049] A. Well, I think that's—that's an accurate interpretation if one takes this sort of statistic notion, an average notion of cost of capital. What you are after, as indicated earlier, is an anticipation, anticipated earnings on equity capital, and that means that what has been true is only a piece of information, it doesn't follow that it is the determining factor, so that if earnings where high in 1947 it doesn't necessarily follow that one anticipates earnings that high in 1948, 1949 and 1950.

Obviously, if you had you made a grievous error, so what you try to do is to look for it. There is probably some explanation, for instance, as to why earnings were that high in 1947, which would lead you to feel on ex-

amination—I don't know what they are but I am assuming there must be something, because it is 1947, being 1948 were so much higher than all the others—you would make an analysis of those years and try to use them to get a better projection of future earnings.

Q. Now, you testified before, Doctor, that if a company had no market for its stock and if there were no comparable companies where you could obtain a market for your stock, you would throw up your hands [2050] at the impossibility of determining the cost of capital of the company from the company's own records; is that correct? A. Yes.

Q. In your opinion, can cost of capital of Hanover be determined—or the rate of cost of capital, or the percentage—call it what you will—be determined from Tables I and II of Defendant's Exhibit 47? A. I don't think so. I don't say one can't make a calculation. Obviously a calculation has been made. It is not a calculation—I am willing to say—with which you could get agreement among any group of economists.

Q. As its being representative of a cost of capital figure? A. Right, but this isn't only true of this one, let me point out. This is true in general of any calculation of a cost of capital.

There was a quote, for instance, if you had ten economists make a calculation, you get ten different answers. This is because you are trying to anticipate the future and there aren't any rigid rules by which this is done.

[2051] You see, the thing that I would like to get over is, through all these proceedings there has been a kind of impression that here is a rigid calculation. It is just not

this way. There are such mental factors that have to enter in, and this means that as you get different people, you would get different judgments being made.

Therefore, you would get different answers.

Now, I don't know if this is—If I am allowed to say this or not, but my own impression would be that there would not be many people who would have the courage of Dr. Corson in making a calculation with these data.

Again, it would depend upon how—I should qualify that to some extent—it depends on how rigidly you want to use the result. If you want to use the result as a very rough guide, O. K., go ahead and make it. But I would say you have to be very careful with something like—with these kind of data because you don't have good theoretical underpinnings for what you are doing when you are computing cost of capital from these kind of data.

Mr. Hayes: May we adjourn now, your Honor?

The Court: Yes.

(Adjourned to December 6, 1962, at 10:30 a.m.)

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[2052] New York, December 6, 1962
10:30 o'clock a.m.

(Trial Resumed.)

RICHARD M. CYERT resumed.

The Court: Good morning.

Mr. Hayes: May we approach the bench, your Honor?

The Court: Yes.

(Discussion at the bench off the record.)

*Direct examination continued by Mr. Hayes:*

Q. Dr. Cyert, do you have before you the tabulations prepared by Dr. Corson, Defendant's Exhibits 48 through 52? A. Yes, I do.

Q. And the application of the so-called 14% cost of capital to the so-called cost of ownership and cost of leasing and the comparison of the two, so far as their so-called future values are concerned, are made on Defendant's Exhibits, I believe, 48, 51 and 52; is that correct? A. The actual comparison is, I believe, on 52.

[2053] Q. That's correct. Defendant's Exhibit 48, I believe, is the calculation of the so-called economic cost of leasing. A. Yes.

Q. And 51, the calculation of the so-called economic cost of ownership. A. Yes.

Q. You have examined those exhibits, have you not, Doctor, as well as the other exhibits prepared and submitted—put in evidence, rather, through Dr. Corson? A. Yes, I have.

Q. Have those exhibits, or do the calculations in those exhibits, and I am thinking particularly of the final one which contains the comparison, Exhibit 52, have any real meaning, any realistic meaning, in your opinion? A. Let me define what I would interpret by your phrase "realistic meaning," and then I will try to elaborate. I think what you mean is do these figures represent anything that would be reflected in a balance sheet and a profit and loss statement of a company.

Q. Correct. A. And the answer to that is no. What we have here is an analysis that I would classify as basically an analysis to determine whether or not a firm should

[2054] purchase machinery as opposed to leasing, given the assumption that it is required that the firm earn 14% —in other words, that it has a criterion that if it earns 14% or more it will invest. What is done here is a perfectly valid analysis, if you understand those qualifications and it is very competent, and while I am not prepared to vouch for the tax rates and so on that are earned, it is perfectly proper to make such an analyis after taxes.

What is done is the following. An analysis has been made of net cash outflow from the firm if you lease, net cash outflow from the firm if the firm purchases. Those dollars for the various years are difficult to compare. This is a slightly technical point but I think it is understood that a dollar in hand today is not of the same value to you today as the promise of a dollar one year from now. In other words, you can't compare the value of a dollar a year from now with a dollar today. The reason is that if you have a dollar today you can invest it and you will earn some money and, therefore, if one said, "Do I want a dollar today or a dollar a year from now?" obviously the dollar today is more valuable because I can invest it and earn interest.

What you have to do here is compare these [2055] dollars which represent outflow from the firm for a series of years; you have to find some way of comparing them, which means putting them on the same basis. This can be done very simply, either by discounting back to a particular year, say 1939, or taking all of the dollars forward to some other year, 1955. Dr. Corson selected the second method. So that each one of those dollars then is treated for each year—for each year each of those dollars is treated

as though then invested at a 14% interest and gained compound interest. Therefore, the final difference between them doesn't represent anything that, say, an accountant would take account of; what it does represent is that given the 14% requirement there is an excess of ownership costs over leasing costs.

To put it another way, and this is the way if I were doing such an analysis—I would say that what this shows is that you won't make 14% on your investment, assuming all the other figures are correct, for my purposes—assuming the tax rates are right and prices are right and so on. If we are just talking about an analysis to aid management in making a decision, the net result of that decision, given those requirements and given that you had the requirement of making 14%, on the investment, the answer then is, to management. "Don't [2056] invest."

It doesn't matter whether that excess is $900,000 or $5, technically—well, actually, if it were real close you'd probably say go ahead and invest, but it doesn't matter whether it is $10,000 or $900,000, the answer is, "Don't invest if you have to make 14% and if there are no other circumstances which would move you to invest."

Now, the interesting thing about this exhibit, I think, and the natural question—

[2057] Q. Are you referring to Defendant's Exhibit 52?

A. 52, yes.

Actually, to the whole analysis. And the natural question that management would raise if such an analysis were presented to it is, what would I make on my investment?

Well, it is relatively easy to go through such analysis and determine what the rate of return is, given these fig-

ures. Excuse me for talking so loud, it is the lecturing.

Now, it turns out—I think you can see this without going into detail—that the rate of interest which will equate those two streams, in other words, the rate of interest that makes the stream of outflow, cash outflow, from the company if you buy, equal to the stream of cash outflow, if you please, shows the rate of return that you would make on your investment if you purchased, and I went through an analysis whereby I applied a 10 per cent rate for future values and then 8 per cent, and then by a process known as interpolation, you can arrive at what the rate of return is.

It turns out the rate of return is something like 9.866 per cent.

Q. Is that taking the— [2058] A. Taking the—

Q. That would be the actual rate of return, assuming the same leasing charges, assuming the same costs. A. Same ownership costs and so on. In other words, now that would say that anyone who invested, given these figures, management—if I were presenting this, I would say: This is the return that you would make, 9.866 per cent.

Well, obviously these extra decimal points are sort of nonsense in this kind of analysis since these figures are rough.

Now, there are some interesting things about this kind of analysis and this is why this full area of making decisions on investment is inexact. For example, here I would like to point out that if one paid for these machines differently, the analysis would be different.

You see, if you notice on Exhibit 51, I believe it is, which is the one where the analysis of the—

Q. Of ownership? A. Of ownership—

Q. Defendant's Exhibit 51. [2059] A. Yes, Defendant's Exhibit 51. You notice that the assumption here is that the company pays out in 1939 $352,000.

Q. No, 356,000. A. Well, net, $352,000.

Q. That's right. A. Now, if in point of fact, let's say that the company made some arrangement whereby they paid for those machines over five years, let us say, then the analysis would be changed because now instead of $352,000 being compounded for the seventeen years, you would compound one-fifth of it there, then the figure 1940 would be larger, but the point is that this would make the compounding—this would change the next figure at the end.

I haven't made this analysis but my guess is what it would show or what it has to show is that the return would be higher. I don't know whether it would still make 14 per cent but it would be higher.

So that there are a variety of questions that a consultant or whoever is advising management, whether it is a controller or what, has to take up with management when the question of whether they should invest or not is to be made. You can't just [2060] present a tabulation, say, "You're through, boy. You can't make 14 per cent." There are many things you can go into.

Q. Now, you are acquainted with Hanover's financial condition from the exhibits in this case setting forth the balance sheets— A. Yes.

Q. —its working capital— A. Very familiar.

Q. —its cash balances, et cetera. From those do you see any need for Hanover to obtain new capital to buy $350,000 or even $550,000 worth of machinery in 1939? A.

Well, I don't. And I base that answer on the following and, as you raise it, this is an opinion, obviously you can't state a fact about this since you can't ever verify it:

It seems to me clear that first Hanover had a great deal of cash on hand. The company has what the economists call a high liquidity preference, it likes to have cash on hand. I talked to Mr. Sheppard a little bit about the philosophy just outside the class—the court—

Mr. Carson: Object to that.

[2061] The Court: Sustained.

A. O.K. Anyway, there are companies like this, you can find it in small companies as well as large companies. They prefer a lot of cash on hand.

It would seem to me that they could easily have financed this thing themselves by taking some of their own cash. Whether they would have had to pay for all the machines at once, I don't know, but it is clear the company did have the funds to make the purchase.

In addition, I would say they were in such a position again as a non-banker. My view is that they would have been able to borrow at a reasonably low interest rate.

Q. Would the effect of borrowing and repaying over a period of years be substantially the same as if they had deferred the investment over a period of years? A. Right. In other words, the way you would change this analysis would be you would modify the cash outflow—if they borrowed, you would modify the cash outflow each year to the amount they would be paying in the bank, and then you would also have to add in the interest costs they would be paying to [2062] the firm.

In other words, that would be you add for each year they paid interest, you would add that as an additional outflow of cash by the ownership method, and then you would spread out the total investment over the number of years that they would just be retaining the major loan. So it is difficult to say what the final calculation would bring in terms of a rate of return.

I think it is fairly clear that it would enable them to make more on their investment. I think the spreading out would be more beneficial to them than the increased small amount that we pay out from the interest charges.

Of course, the optimum thing for them would be to make an arrangement to buy the machines and pay for them over a period of time.

Q. You said if you made this calculation. What you are talking about there is if you made a calculation in accordance with the methods Dr. Corson used? A. Yes.

Q. Now, you will notice that on the top of Exhibit 48 the phrase "economic cost of leasing" is used. On Defendant's Exhibit 51, economic cost of ownership, [2063] and on Defendant's Exhibit 52 the comparison of both those so-called economic costs of ownership and leasing. A Yes.

Q. Would you comment on the use of the phrase in connection with these exhibits of economic cost? A. Yes.

Q. And I believe Dr. Corson testified that the final figure he arrived at, the $900,000 difference, was a true economic cost? A. Yes. Well, the notion of economic cost is a kind of—can be a misleading one. I think again in order to understand what these words mean, you have to have something more in the way of an example. What

the economist is trying to get at when he talks about economic cost—and I think probably some of the things that Dr. Corson said he did make this—he was correct in his definition of it—I think, however, there is some misleading implications of the way it was used.

Let me just try to make a simple example. First, a definition and an example. Basically, what the economist is talking about when he says "economic cost" is that a decision is taken which in some sense doesn't maximize something.

[2064] In other words, that a firm makes investment, let us say, and makes it in such a way that it doesn't earn as much as it could. Or let us say a man makes a career decision and doesn't make it in such a way as to maximize his income.

In this latter connection let us take a simple example of an academician. People always like to flatter academicians by telling them, "You could earn so much more money if you went into business." I never tried to take anyone up on this so I am not sure how true it is, but let's suppose it is true. Let's suppose a man makes a decision to become a professor, and let's suppose he is paid $10,000 a year. And let's say that someone offers him another job. At the time he makes that decision someone offers him another job at $20,000.

Then one could say the economic cost of his choice was $10,000, meaning that he didn't exploit to the full his opportunity, so that there is a $10,000 economic cost.

Now, you see, as far as he is concerned in terms of his life, in terms of how much money he spends, what he pays in terms of income taxes and so on, this difference

between $20,000 and $10,000 is nonexistent. [2065] To an economist evaluating his behavior, he would say there is an economic cost concerned with his decision, and if he were really going to try to be very rational, he would say, "What are the advantages that you are getting by being a professor; are they equal to the $10,000?" But let's ignore that for the moment.

Now, I might go on a little bit to something that is also related to this—

Q. Let me stop you on that illustration, if I may, Doctor.
A. Yes.

Q. Suppose five years after he decided to be a professor he discovered for the first time that there had been a conspiracy among the colleges and universities to limit the salaries to $10,000, and we were able to demonstrate that without that conspiracy he would have received $15,000.

Would you say, economically speaking, he had suffered no damage as a result of the conspiracy?

Mr. Carson: Objected to as to form and irrelevant.

The Court: Overruled.

A. Well, I think really the answer follows from [2066] my previous point that the difference between the $10,000 and $20,000 is irrelevant.

The critical point for this man is what is the difference between $15,000 and $10,000? Given his choice that he took his career, the facts that you describe would say that—would indicate that he could have, if the game had been played according to the rules that we have in this country—he would have earned $15,000. Therefore, the

effect of this conspiracy on him would have been to deprive him of $5,000 for those five years.

The fact that he didn't make the decision to go in and take the $20,000 is irrelevant for this purpose. It is relevant only to the economist who is evaluating his behavior under the conditions of something that he calls rational behavior. Rational always means maximizing or minimizing in economics.

Q. I interrupted you. You were going to say something else with respect to the economic cost, Doctor? A. Well, the major point that I wanted to emphasize was that it doesn't—economic cost isn't something that is reflected on on a profit and loss statement or balance sheet.

[2067] Further, the bothersome thing about $949,000 first is the fact that there isn't anything necessary that you compare this figure to, you see. What this says is that—well, the assumption is that if they had bought, if they had bought the machines, that they would have fallen short of the $949,000, but the $949,000, you see, is in a sense an artificial figure since it reflects the compounding over the seventeen years.

I could just as well have made an analysis or Dr. Corson or anyone else could have made an analysis which brought everything back to 1939. So then you would say the true economic cost would be $82,000, or some such number, whatever this turns out to be.

Again, this all is partially on the assumption of—

Q. You mean discounting it instead of trying to get future value? A. Yes, then it would make it smaller. So I don't know in this kind of game what one would say is the true economic cost.

The notion here is that it is attempted to be developed in these exhibits is that somehow the man [2068] should have earned 14 per cent. If he falls short of that, there is an economic cost. It is analogous to the difference between $10,000 and $20,000.

Q. Do these exhibits, Defendant's Exhibits 48, 51 and 52, demonstrate anything more than this, Doctor: That Hanover, if you compare the leasing of the machines by Hanover, and the purchase of the machines by Hanover—Hanover would not make 14 per cent on its investment in the machines as against investment in continuing to lease?

Mr. Carson: Objected to as leading and contrary to the evidence.

The Court: All right, sustained.

Mr. Hayes: May I inquire of your Honor which ground you sustained the objection?

The Court: Relative to leading. I think it has been demonstrated, but you can probably reframe your question. Ask him what it means.

Q. What do these exhibits, Defendant's Exhibits 48, 51 and 52, really show? A. They are designed—as I understand them, I am quite sure I do, they are designed to answer the question should management invest in these machines for whatever reason they have to make 14 per cent on [2069] their investment. The answer comes out to be no. And this is what they are designed to do. This is the only thing that they are designed to do.

Now, I might point out in terms of my understanding of the case that my statement isn't quite accurate because this does take up, I believe, only twenty machines and there are a total of thirty-eight, although I understand—

Q. Fifty-eight. A. Fifty-eight. Although I understand that the twenty that are taken up here account for something like 80 per cent of the value, so that the total decision might not be changed, but if I were going to prepare something like this for management, then I would certainly want to take up the total investment, and it is conceiveable that the other 20 per cent might modify that decision.

But again I have not tried to make this calculation and don't know.

Now, there is another point that I think is important here, too, to realize. This is of course an artificial—in point of fact this is not the way that in 1939 one could have presented this material, obviously. What we have done here now is [2070] to show how much in effect actually happened, at least actually happened by all of the—actually happened in the sense of how much leasing charges were paid out and how much was paid out in terms of—by the assumptions, how much would have been paid out in terms of ownership.

If you were doing this in 1939, you have to forecast this and it might well be—you see, it could well have turned out completely different in 1939 by making this kind of a forecast. The tendency—well, it would be just very difficult to forecast for seventeen years with any degree of accuracy. If you were sitting there in 1939. And I think this has to be borne in mind.

I guess also I would doubt whether—I would doubt whether anyone in Hanover would have been using 14 per cent in 1939. Well, I don't know. I guess this is just speculation, but it doesn't seem realistic to me to think

of a shoe company in 1939 ever thinking they were going to make as much on their investment as in point of fact they did periodically. You know these were not great times in 1939.

[2071] Q. As a matter of fact, Table II of Defendant's Exhibit 47 shows that what Hanover made in 1939 was 7.4% on investments, and in 1940, 7.94% on investments. A. Yes.

Q. You testified that—

> Mr. Carson: I think your figures are a little wrong, but the exhibit speaks for itself.
>
> Mr. Hayes: 7.47 and 7.94.
>
> Mr. Carson: That's right.
>
> Mr. Hayes: Isn't that what I said? I thought it was. That is what I meant to say.

Q. I think you testified yesterday that you are fully familiar with the Leidesdorf calculations and the approaches made. A. Yes.

Q. The final supposed excess of costs of ownership over costs of leasing, according to Defendant's Exhibit 52, is $950,000, speaking in round figures? A. Yes.

Q. What relation, if any, does that figure have to the difference between cost of leasing and cost of ownership, as demonstrated in the Leidesdorf calculations? A. There isn't any relationship between the two because they are designed for different purpose, as I [2072] understand both calculations. They are sort of perpendicular to each other. In the one case, in the Leidesdorf calculations, as I understand it—I think I do—this is an attempt to reconstruct the effects on the balance sheet and profit and

loss statement—I guess primarily the profit and loss statement. This is an attempt to look at what would have happened, assuming that the machines had been purchased, you see. In the Leidesdorf calculation the basic assumption has to be that the machines were purchased. In this calculation, the defendant's calculation, the objective is to determine whether the company should purchase, given that it has to make 14% on its investment. Given those assumptions, the answer is no.

In the Leidesdorf calculations, what you are doing is going through on a year-by-year basis and saying, "What would have happened basically to the cash to this company if it had been allowed to purchase?" but the basic assumption has to be purchase. The basic assumption is that the machines were purchased, otherwise it makes no sense; whereas in this one you are looking at the situation of should they have purchased, given that they had to make 14% on their investment.

I think it is important to understand those [2073] two—the objective of the calculations. The $949,000 in the defendant's calculation does not represent items on the balance sheet.

Q. Or the profit and loss statement? A. Yes. It is this $10,000 that is the difference between what the professor gets when he takes his job versus what he might have gotten if he had gone into industry.

Q. By the same token, the Leidesdorf calculation is the difference between what he got at $10,000 and what he would have gotten if there were not a conspiracy among the colleges and he would have gotten $15,000? A. I think you can make that analogy. In other words, that is the $5,000 part.

Q. Is there anything else you have to add to what you have already given in your testimony yesterday afternoon and today with respect to the first two criticisms that Dr. Corson leveled at the Leidesdorf calculations, to wit, the failure to use what he called "cost of capital" and, two, the failure to find the future value, or have you covered that so far? A. I would like to summarize those so that there isn't any confusion on where I stand versus where he [2074] stands, and maybe this is repetitive and if so I apologize.

The calculation that he used is perfectly proper as an aid to decision-making. I would give him an A if he were in my class for it although I guess I would have to check the tax rates, but it is not clear at all that because one does those things, that is, introduces taxes, introduces the notion of future value or present worth as discounting—it is not clear that you want to use those same techniques if what you are trying to do is to reconstruct what would have happened to the profit and loss statement. The latter one, the latter problem, is a different problem, and one has to approach that, I believe, differently.

Q. Would you say that— A. There are different considerations that have to go into that.

Q. Would you say that because of what you just testified to the calculations on Defendant's Exhibits 48, 51 and 52 just have no relation to the Leidesdorf calculations at all?

Mr. Carson: Object to the form.

The Court: I think it has been answered before. I will overrule that.

[2075] You object because it is leading?

Mr. Carson: Yes, sir. He is putting words in the witness's mouth in the clearest way and we need the witness's opinion.

The Court: I will sustain the objection.

Ask the question directly, if you will.

Q. What, in your opinion, Doctor, is the relation, if any, between the Leidesdorf calculations, which you say attempt to forecast what the effect on the profit and loss statement would be, and the $949,000 on Defendant's Exhibit 52, which you say shows in effect that Hanover, if it made the investment, would fail to make 14% by that amount? A. The basic relationship between them is really one that I have said: they are computed for different purposes and therefore they have—the figures don't relate to each other. The only logical relationship to them, as I understand the case, is that somehow the calculations of Dr. Corson are to prove that the defendant wouldn't have made the decision to purchase the machines. This is my understanding of it.

Q. You mean the plaintiff wouldn't have made the decision? A. The plaintiff. I am sorry.

[2076] Q. Let me direct your attention to the third criticism that Dr. Corson leveled at the Leidesdorf calculation, and that was the failure to consider taxes.

You recall that testimony, do you not, Doctor? A. Yes.

Q. Will you comment on that criticism of Dr. Corson's. A. My position there would be similar to the one that we have already had to the other comments, that I would heartily endorse the notion of introducing taxes on making a decision on preparing data for management to make a decision as to whether they should purchase or not. This

is a perfectly proper thing. The question of whether one should introduce tax considerations or not when one gets into the question of reconstructing the balance sheet seems to me to be much more nebulous; it doesn't seem to me that it follows, but you would use it in the decision-making situation; you would also want to use it in attempting to reconstruct the effects of purchasing. I guess I just can't agree with him that this is a criticism, at least not without a great deal more elaboration on his part.

In other words, I don't see his point at this juncture as to why one has to introduce tax considerations [2077] when you are attempting to reconstruct the facts in the profit and loss statement from a decision to purchase. It is perfectly true that in making the decision I think everyone will agree that after-tax calculations are the ones. You want to look at this. If you are going to invest, look at the after-tax situation, but in the other problem it is not at all clear.

Q. Would you have any opinion, as an economist, on a question as to whether or not taxes should be deducted in the Leidesdorf calculations if used for the purpose of calculting damages in this action? A. I would see that as a legal question primarily. I don't think that I am competent to judge the law on that. However, there is one point—everyone likes to be a lawyer, I guess, just as everyone likes to be an economist, and I have thought about this a little bit—from one point, that is analogous to a situation that exists in the question of taxing dividends: there is a notion of double taxation that comes out of public finance, you know, where the corporation is taxed on its income and then pays out dividends and the

individual is taxed and for many years there has been a controversy about double taxation.

It strikes me in this case, and this is [2078] bothersome and I don't know the final answer, and I think it is a legal question—if you compute the so-called damages after taxes and then the plaintiff—suppose the plaintiff were awarded some, then he is taxed on those and it strikes me you have again the equivalent of double taxation, but as far as I have gone—

Q. Let me shift to the last criticism that Dr. Corson leveled at the Leidesdorf calculations, and that was the use of the consumer all-items price index, which is set forth in Plaintiff's Exhibit 40, and in that connection he testified that because of the fact that it reflects consumer goods—

The Court: May I interrupt a moment, Mr. Hayes.

Off the record.

(Discussion off the record.)

The Court: We will take a short recess.

(A short recess.)

*By Mr. Hayes:*

Q. Doctor, we were about to start on Dr. Corson's criticism of the use by Leidesdorf of the BLS, consumer index, all items, and you recall his testimony? A. Yes.

[2079] Q. That it was improper, it measured the changes of price in the market-basket approach, so to speak. A. Yes.

Q. And you are acquainted, of course, with the consumer price index, all items? A. Yes.

Q. And I believe Dr. Corson testified that he knew of no specific index that would be applicable in this situation. Do you agree with that? A. By its very nature it can't be because the prices that you want to measure didn't exist in 1939, since the machinery couldn't be sold.

Q. Doctor, Corson also said that the proper way was to use a leasing cost, as an index arrived at from the lease-cost, what he called the lease-cost method, which appears in Defendant's Exhibit 81 in evidence, which I think I have before you.

Do you have that before you? A. It is marked 78 here.

Q. It has become since then Defendant's Exhibit 81. A. Yes, I see that.

Q. I show you Plaintiff's Exhibit 77 in evidence, [2080] which I believe you will recall Dr. Corson testified were the sale prices he arrived at by using the leasing-cost method worked out in Defendant's Exhibit 81. Do you recall that? A. Yes, I do.

Q. Now you have before you Defendant's Exhibit 78 in evidence. I notice on Defendant's Exhibit 78 in evidence the computed net costs of ownership, as they appear in the Leidesdorf calculations amount to $454,000. A. That's right.

Q. Speaking in rough figures. A. Yes, for the first 20 machines, I believe.

Q. That's right. The computed net costs of ownership determined by Dr. Corson's leasing cost index would amount to $384,000. A. Rounded off, that's right.

Q. Or a difference, roughly, of $71,000; is that correct? A. That's right.

Q. If, Dr. Cyert, the Leidesdorf calculations had used the cost of ownership arrived at by Dr. Corson in Defendant's Exhibit 78, under the leasing-cost index as against the cost of machines, assuming they could [2081] be bought, derived from the use of the BLS index, what would the effect have been on the Leidesdorf calculations? A. Well, it is pretty clear what the effect would have been; it would have been to increase the damages as shown on the Leidesdorf calculation. I can illustrate that—

Q. By the difference I mentioned of $71,000? A. Yes. We should have a blackboard here. If you think of leasing changes as represented up here (indicating), the Leidesdorf calculation essentially is to take from those leasing charges the cost of ownership, so that the higher the cost of ownership, the lower the damage, because they are taking that difference and the lower the cost of the machinery, the greater the difference. The difference is the amount between my hands. You raise cost of ownership and decrease damages, and as you lower cost of ownership, you increase damages.

I probably shouldn't go into this but just let me point out that it is sufficient just to look at the final figure there because there is a linear sort of combination and the fact that you come out with $383,000 for net ownership, even though you start out with $443,000, [2082] you would still end up, under the Leidesdorf calculations, Dr. Corson's leasing-cost index, with higher damages of approximately $71,000.

Q. What is your opinion, Doctor, about the propriety of using the consumer all-items price index as was used in the Leidesdorf calculations? A. Let me say this. Dr.

Corson's testimony on the index was quite accurate; it is an index designed to measure the cost of living for a particular group. This particular group turns out, of course, to be a large segment of our society and I think it is quite accurate to state that there isn't any one index which is the universal measure of everything that happens in the economy—the economy is complex, too many dimensions. It is clear to me, however, that the general trend of prices—in other words, the economist talks about the price level, and I think it is reasonable to say that the consumer price index is a reasonable indicator of the general price level, remembering that there is no one best measure of the general price level. This is a reasonable measure of the general price level.

Q. When you were first consulted by my firm, Doctor, you were shown the Leidesdorf reports, if I recall correctly, and you were told about the use of the [2083] BLS and were you also shown what is now Plaintiff's Exhibit 61? A. Yes. Let me elaborate on that a moment. My notion is a situation like this is that what you are doing is trying to reconstruct a situation that of course did not exist. If it existed, we wouldn't be here. What you are trying to do is equivalent to an estimation problem, and let me point out that we live by estimation. There are estimations all through our society, all through the business world. We have to do this. What we are trying to do is to estimate some effects of a situation. In other words, we are saying if they had been allowed to purchase and had purchased, what would happen. I don't think there is any question but that we are estimating.

My initial reaction on this was to say that the BLS consumer price index is reasonable for the reasons I just

stated; it is a reasonable measure—a reasonable measure, not the only measure—of the general price level. My reaction in this, as in other problems that I have been involved in with estimations, is to get some other measures and let's see whether all these measures are in the same ball park. What you are trying to do and what I feel needs to be done is that [2084] you have to get checks on yourself because you are estimating and there isn't any scientific way which is the right way of doing this.

My approach is, "Let's get some other things." I immediately said to Mr. Morton, when he explained this to me, "O.K. I think that is reasonable. Is there any other way that we can estimate this that would give us further evidence as to whether we are in the right ball park, whether we are getting things in the right magnitude?"

At that point he explained to me—it was the first time I understood this—I had not been so intimate with the case that I realized that United had actually sold some machines, so I asked him what else they had. He produced the optional machinery index.

Q. That is Plaintiff's Exhibit 61? A. This is represented by Plaintiff's Exhibit 61. It struck me as a reasonable kind of check. In other words, again not the only check but another reasonable check. This is what I was after.

Q. After further thought, did you have a further suggestion to make? A. Let me just point out that I felt, if you look at these figures—

[2085] Q. On Plaintiff's Exhibit 61? A. On Plaintiff's Exhibit 61. I feel that I am justified in saying that these do give me at least enough additional evidence to have

some confidence in the results of using the consumer price index; they are in the ball park and in general the consumer price index is conservative in relation to these in the sense that they reduce the damages of Hanover. In other words, obviously you couldn't use any one of these, but in general these would tend to give you still lower machinery costs and if you remember my notion, the lower the machinery costs, the greater the damages, so that I felt reasonably justified on that kind of calculation—"justified" is not the word; I felt reassured.

Then again the approach in all these things is to try to get as many checks as you can. It was not the same day, but I think it was somewhat later, when I got back to thinking about the case, and I suggested another way of looking at this would be to say take the relationship in 1955, when they finally did sell machines and established prices, and see what relationship that bore to the leasing charges—I didn't know about royalties at that point—and then see how that ratio would compare [2085a] with things in 1939, when Dr. Corson came up with this leasing index, and I guess my stock rose with the law firm.

[2086] Q. Was the first time you saw Defendant's Exhibit 81 and Plaintiff's Exhibit 77 at my office sometime Tuesday afternoon or Tuesday night? A. That is right.

Q. And prior to that time had you available to you the unit charges and monthly rentals on the machines that Dr. Corson used for the year 1939? A. No.

Q. And on Tuesday night did you in collaboration with Mr. Cayo have our firm work out a lease cost price index? A. That is correct.

Mr. Hayes: Will you mark that for identification, please.

(Plaintiff's Exhibit 93 marked for identification.)

Q. I show you Plaintiff's Exhibit 93 for identification, the first page of which is headed "Sale Prices determined by the lease cost method" and the second page is the method of calculation.

Now will you explain briefly to the Court just how the statements in Plaintiff's Exhibit 93 for identification were prepared? A. Yes. Could I ask for those rough calcula [2087] tions? I think, Ron, that I could use some examples there that would help make the explanation easier.

(Document handed to witness.)

A. (Continuing) Let's take machine No. 1, for example, The first thing that was done was to take the rents and royalties that had been paid by Hanover for the machine in 1939, to double these so that you had them for the whole year of 1939, since the actual calculations were only for six months. In this case, these were something—for machine No. 1 there was something like $7,000.

Now, then, there were nineteen machines of type No. 1. By dividing the nineteen into roughly the $14,000—double the royalties which were roughly $7,000—rents and royalties—this gave you $14,000, dividing by the nineteen, which gave you a total of $767.04, which were the calculations—which was the average rent and royalties per machine paid by Hanover to United.

Now, then by taking the unit charge first, .045, dividing that into the 767, you would get the amount of production.

Did I go too fast now or is that clear? In other words,

what you are after here—let me put it [2088] this way—what you are trying to do is to deduce from the rents and royalties and the number of machines you have what the production was. The production turns out in this case to be 17,000 stitches.

Q. For that machine? A. For that machine.

Mr. Carson: Excuse me, which machine is this?

The Witness: This is machine No. 1. Would you like me to go over the figures?

Mr. Carson: That's all right.

A. (Continuing) Then in 1955—

Q. Is there a rental charge added, if there was a rental charge applicable in 1939? A. There isn't in this particular case. You wouldn't want to add it, you see. If I find one with a—well—

Q. I think No. 10 had a rental charge. A. Well, actually there turns out to be a rental charge on this one in 1955, so I can explain it.

Q. Yes, but if there were a rental charge applicable in 1939, that would be added also? A. First you want to deduct it before determining the production.

Q. That's right. [2089] A. You deduct it in order to determine what the production was and then you would get it back in.

I can go through that very nicely with 1955 value.

So what this says is that production in 1939, as inferred from these charges, deduced from these charges, is 17,045. Now, then, if you look at the 1955 prices, they turn out—you have a unit charge there of 3 cents, so you multiply the 3 cents times the 17,045, which gives you a production

in 1939, see. This is what we are holding constant. In any index you have to hold something constant. Here it turns out to be the production in 1939, which in my view is the thing that you want to hold constant.

The 3 cents times 17 gives you something like 51135.

Now, in this case you would add the rental charges which turn out to be $20 a month, you add in for twelve months, it gives you $240. So that says in 1955, for machine No. 1, you paid a total of $751.35.

Now, in 1939 per machine we paid a total of $767, so by comparing the 767 to the 751, you get a figure of something like 102 per cent.

That means that if you take that 102 per cent [2090] and multiply it times the price of machine No. 1 in 1955, you will get the price that should have existed in 1939. In other words, you will get an estimate of the price in 1939.

We really should have a blackboard. In other words, what you are doing here is taking the amount paid in 1939 over the amount paid in 1955. You have got that on one side of your equation. That should equal the price in 1939, which is an unknown, divided by the price in 1955, which is known.

So then if you think back to your algebra, what you are doing is taking—you are multiplying both sides by the denominator and it cancels out on the righthand side, and multiplies this ratio, which is 102, so the 102 is multiplied by the 1939 price and that 1955 price and that gives an estimate of the '39 price. It is an approach known in statistics as a ratio estimate.

Q. All right, now, going back to Plaintiff's Exhibit 93, to the first page of it, if you would, does that first page set forth for twenty machines the 1955 sales prices which

were actual, and the 1939 sales prices as calculated in the method you have just described? [2091] A. That is right. That is exactly how we got those.

So if you multiply—we can now do a little further verification. If you multiplied $5,950 by 2.1, you would get 2,074, unless the machine broke down on this.

Q. And then you have totals and a calculation on the bottom. What is the reason for that? A. You see what you are after here is not what is the price index with respect to machine No. 1 or machine No. 2, what you are after is some kind of combined index, so you have to find some way of relating 1955 prices to 1939 prices.

Q. Is one reason for what you just said the fact that the data are available for only twenty machines and you have fifty-eight machines about which you are concerned that you want an overall index, is that correct? [2092] A. Well, that is only partly it. In general you are after an overall index because the consumer price index is an overall index. I wanted something that would give me a further notion of whether or not the consumer price index was in the right ball park, and I had the optional one, and now I want a further one. If I could have thought of a third one, I would have taxed your firm to try to find the figures and come up with it. I haven't been able to come up with another one.

So that given that we have these things, I wanted these put into a single figure.

Now, by adding up these prices, by adding these 1955 prices up, and by adding the 1939 prices up, making the comparison, then what you get is an index of these machines by the lease-cost method. The reason for adding

all these together is that this is essentially what the statistician would call a self-weighting method. In other words, the more experience I have, the machines will count more, which is what you want, and so by comparing the total value of these twenty machines in 1939 prices, with the total value of these machines in 1955 prices, you get a gain, given the correctness of our arithmetic—you get an index of 52.9, which almost [2093] looks like a put-up job, because it turns out the consumer price index is 51.9, if my recollection is correct, in 1939.

Q. And would you describe that 52.9 as a weighted average? A. Yes, it is self-weighted in this one.

Q. I assumed so but I did not think you said so. A. Yes. There are also other ways of weighting, presumably. There are many ways of weighting indexes as there are statisticians, but this is sound by my way, and we decided on the method before we knew the answer. So far as I know, unless Mr. Cayo did some work behind the scenes, this is the only method we tried.

Q. Isn't it a fact that you suggested the method before you heard Dr. Corson testify but we didn't have the data available? A. Precisely.

Mr. Hayes: I offer in evidence Plaintiff's Exhibit 93 for identification.

Mr. Carson: Objected to as irrelevant and without foundation. I think the testimony shows that the index, so-called, is constructed on constructed figures, not on real figures. That is, the witness has explained, using the second page of Exhibit 93 for [2094] identification, as a description of the method, that the 1939 calculated sale prices are

themselves constructs which he is employing for the purpose of delivering the ratio of 25.9%

Now what Dr. Corson did was to establish a ratio between real figures, that is, the ratio of the 1955 sale prices, and lease terms which existed, and which when established was then applied by him to derive an index applicable backwards to the really existing 1939 to 1954 lease terms.

Mr. Hayes: Exactly—

The Witness: Could I?

Mr. Hayes: Pardon me. Just a second.

Mr. Carson: I may have misunderstood the testimony.

Mr. Hayes: He took the actual production, he took the actual rents and royalties paid, he took the actual rates which for 1939 we did not learn until we got Dr. Corson's testimony.

The Court: Yes, as I understand the testimony, while it is a 1939 calculated sales price, it is a sales price calculated from real figures; isn't that right?

The Witness: Yes, that's exactly right. Let me put it another way. Maybe this would make it [2095] clearer. What we could have done, which would have been another way of doing it, would have been to add up all of the royalty charges as computed here in 1939, all of the royalty charges in 1955, and get that ratio, then multiply all of the '39 sales prices by that ratio.

Q. But you would be using actual figures? A. Yes, you would be using actual figures. It is constructed in the

sense that an index is constructed. You are deriving the index, you are measuring the index.

Mr. Carson: I have no objection to constructing an index for real figures.

The Court: I think that is what he has done.

Objection overruled. We will admit 93 in evidence.

(Received in evidence as Plaintiff's Exhibit 93.)

Mr. Hayes: I have no further questions of Dr. Cyert at this time.

* * * * *

[2178] Q. Going back to our original question, didn't you understand when you testified on Mr. Hayes's examination that Dr. Corson's documents, exhibits, which you were testifying about, proceeded on the basis of the Leidesdorf computations? A. Sure.

Q. And that they attempted to add three factors, cost of capital, taxes and future worth, to the figures in the Leidesdorf computations on the basis of the Leidesdorf assumptions? You knew that, didn't you? A. Well, you see—

Q. Can't you answer that yes or no, or have I stated it wrong? A. You have stated it in an ambiguous fashion because I think there may have been some misunderstanding. You can't just sort of add some concepts to that. In the process of his work, when he did—he may have thought he was just adding something to them. In the process of his working, what he did was to produce a document that is basically the document as I have described it, namely, it is the kind of thing that

one would present to [2179] management to decide whether or not to buy or to lease. He is not adding something there that has the same purpose as the Leidesdorf calculations.

Q. Is it your point that the Leidesdorf calculations were not documents which would be presented to management in order to decide whether to buy or to lease? A. Oh, definitely not.

Q. Definitely not? A. Yes. They are already on the assumption that the machine was purchased. That is the point. They are an attempt to reconstruct the balance sheet and the profit and loss statement along the lines of what would happen given that the company had bought the machines. That is their purpose.

• • • • •

[2186] Q. Let's go to the sale of stock; did you say that had nothing to do with the matter during this particular period? A. Those particular sales of stock had nothing to do with whether or not you were going to make the investment. In other words, the sales of stock had nothing to—knowing what stock sold for, or let's say knowing what stock was sold certainly wouldn't help you, particularly in making the decision in 1939, nor would you have to forecast that.

• • • • •

[2189] Q. Going back to my question, are you familiar with an article of which I show you a reprint of Joel Dean called the "Present Cost of Investing in a Company's Future"? Reprinted from "Planning Ahead for Profits" by American Management Association, 1958? A. No, I generally don't read—see their publications. I suspect he said

something that is very similar to something I have read, so I am willing to comment on it.

Q. Let me read you a passage from page 90 and see if you would agree with it:

> "Estimating a company's market cost of [2190] capital is a complicated task concerning which there is wide disagreement even among professionals."

You would agree with that, wouldn't you? A. I have so stated.

* * * * *

[2205] A. Let me read this phrase from Dean, from page 576. This is the book, Managerial Economics.

> "Any estimate of the cost of equity capital based on statistical analysis thus relies on broad assumptions of the relevance of measurable current and historical data to market expectations."

In other words, this is, as I said, if I were going to make a projection to the future as to what the cost of capital will be, then I certainly would rely on some current data and some immediate past data like, for instance, gross trends and so on.

[2206] But what I have been saying—and this is where we are not getting together—to go over a company's past record and try to make the statement that is what its cost of capital was is misleading in the sense that if they had taken different actions in 1939, had been able to take different actions in 1939, then the cost of capital would have been different.

Or, in other words, to go back over the record when they didn't invest and measure cost of capital and then say

that is what the cost of capital is, if they had invested, is completely false.

* * * * *

[2209] Q. Well, apart from your personal experience. I meant to your knowledge as a scholar in the field of economics. A. Let me be very frank with you now. The only use that I have ever seen in practice of this has been in the shoe machinery case, that is, the calculations that Dean and Anthony tried to do for a different purpose. I do not, of my own knowledge, know of a corporation that is doing this. I know that Dean has argued that he has been able to calculate it, and you have read something about it. I know the theoretical literature on the subject and as I have read before, this is certainly something that people are trying to introduce into capital budgeting decisions.

Q. People are trying to introduce it into capital budgeting decisions? A. Yes. The difficulty is that nobody agrees on how it can be measured.

* * * * *

[2261] Q. Is it your opinion as expressed here that the cost of capital in no way and at no time entered into the accounting records of the corporation? A. Yes, I would say that.

Q. By accounting records you mean the annual balance sheet and profit and loss statement? A. Yes.

Q. Well, would you assume that a shoe manufacturer has a cost of capital, much of it derived from debt and preferred stock of between 12% and 15% and that he invests $1 million in a new plant on which his return is between 6% and 7½%; please further assume that the life

of the building exceeds 25 years. Would this investment be reflected in a lower ratio as between annual average net income before taxes on the successive profit and loss statements? A. Well, the answer to that is obvious, that you don't know.

Q. It wouldn't? A. No. What are business conditions like? It may well be that business conditions are such if you are in a rising market that this thing turns out to be extremely profitable.

Q. I asked you to assume only what I stated in [2262] the question, nothing else. A. I can't answer it without some assumption about business conditions.

Q. Let's assume that business conditions remain unchanged. A. That the company has previously been earning 12% to 15%?

Q. Which I called in my question cost of capital. A. Yes, and now they invest some money from the company's funds?

Q. Yes. A. They make 6%?

Q. 6% to 7½%. A. And these funds had previously been unused?

Q. Yes. A. Then they would show on their accounting records a greater profit.

Q. You say they would show on their accounting records a great profit even though the money cost them on my assumption between 12% and 15%? A. You see, that's—yes, that's exactly right. What I said is exactly right.

Q. If you assumed that they had to raise the money from debt or sale of stock, would your answer be different? [2263] A. Well, you have to take them separately. If you assume that they raised the money by a sale of stock,

then what you've got is more equity capital, which has been raised—and let's assume that your 12% and 15% holds, which means that the stock presumably is selling at something like seven or eight times earnings, what would be reflected in the company—let's take that case—is higher profits, but a lower rate of earnings on your equity capital, which presumably would be reflected eventually, again depending on stock market conditions, could well be reflected in a low price of the stock.

If you take the debt, if you assume that they raise the funds from debt, and whatever interest rate you want to use, assuming that it is less than the 6% that you are talking about, then they would show up with higher profits and a higher earnings to equity ratio than before. The effect on stock prices would be difficult to predict because of the effect of the increased debt in the way of market, but in terms of the straight bookkeeping aspects and accounting aspects, you would find higher profits than before because you now have in there capital which has not been in before on which you are earning more than you are paying.

[2264] Q. Of course we have a lot of different assumptions, and I don't want to go over them again, but isn't it a fact that depending on what assumption you would use, you would reflect a change in ratio as between the annual income before taxes on the profit and loss statements and the stockholders' equity on the successive balance sheet? A. The ratio between profits and stockholders' equity?

Q. Yes. A. That would change; in two of the cases it would go up and in one it would go down.

Q. That would change and your deviation, whichever way it would be from the cost of capital would get into

the accounting of the corporation, wouldn't it? A. Of course not. You don't have—in the accounting you don't have the earnings to stock price ratio.

Q. Haven't you just answered now as to the effect on the successive profit and loss statements and balance sheets? That is the accounting of the corporation, isn't it? A. Yes, the profit would get in. The profit that is made on the investment would get in. I have said [2265] in both cases, in all three cases the profits would be greater.

Q. In all these cases they would be greater? A. Of course they would. You are getting new capital into the firm and you are earning some money on it.

Q. Regardless of the fact that on one of the assumptions the rate of return of 12% to 15% was not received from the investment? A. Yes, because you see you are not paying out that money. You are selling some stock and you are getting that stock back, the money from that stock back, and investing it. Previously that money wasn't there. Now the effect that shows up is the one that I mentioned, namely, that the ratio between earnings and stockholders' equity will go down from where it was. That will lower that, but that's that part of the accounting records. That is not something by which you compute profit and loss.

Q. That ratio is reflected in the balance sheets and in the profit and loss statements, isn't it? A. Let us say you can compute it from data that would frequently be submitted, yes.

Q. Can you compute it from anything else? You [2266] have to compute it from those statements, don't you? A. By "it" you mean—

Q. Ratio. A. The ratio of earnings to stockholders' equity?

Q. Yes. A. You presumably can get this—can get the total investment, I suppose, from other sources. I suppose you can get a total investment from a prospectus, for instance. I don't know what you are after there. It is possible for you to get earnings and just the earnings, and it would be possible for us to get the stockholders' equity from a variety of sources.

Q. Your answer then is that even on none of these assumptions does the cost of capital enter into the accounting records of the corporation; is that your answer? A. That's right.

Q. On none of these assumptions would the book value per share as derived from the balance sheet be affected? A. The book value per share? Presumably on all of these methods the book value per share is going to be affected. You have made an investment and therefore your book value has changed.

[2267] Q. And you don't consider that that fact affects your answer about the use of the cost of capital affecting the accounting records of the corporation?

Do you understand my question? A. Let me just think about it a minute.

The fact that book value changes, does that mean that I don't consider cost of capital affecting the records? I guess the answer to that has to be no, I don't.

* * * * *

[2268] Q. Now, you base part of your testimony upon the assumptions I think were given to you by Mr. Hayes as to a restrictive agreement among the stockholders, did you?

A. I would say that and the fact that these were sales to stockholders and employees and the fact that this is not a stock that is sold publicly, at least during this period it wasn't. There was no market for it.

Q. There was no public market at all for this stock in 1939 to '55, was there? A. That's right.

[2269] Q. Is it your testimony that in the absence of a public market for the common stock you could not use the sales made as shown on D47 as an indication of the cost of capital? A. That's right.

Q. Now you recognize, do you not, that the prices fixed on the sales are prices fixed by the board of directors of Hanover? A. That's right.

Q. And that they represent the figures which the controlling stockholders sitting on the board were willing to sell shares for and which the purchasers were willing to buy them for? A. That's right.

Q. Isn't this under the concept of economic concept of cost of capital, even if not the most satisfactory indication, an indication which you are to take into account in determining Hanover's cost of capital?

Mr. Hayes: May I have the question, please.

(Question read.)

A. The answer is no, because those prices obviously do not represent a price arrived at by the market, and this is what you are after when you are trying in compute cost of capital. These were prices [2270] for stock in which the purchaser was being given a benefit, the company was trying to keep key employees happy, and it was

trying to make its major—give its major stockholders additional benefit.

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[2277] Q. You again say you cannot use a rate of return in assessing the situation backward when you have to make a determination over the past sixteen years? Is that what you are saying? A. Not quite. Let's put it this way: If I were going to compute the cost of capital for 1945 I would certainly want to take account of what the trends were showing from 1944 and 1943 and some years back. This is one of the facts you take.

If I wanted to compute it for 1939, I would want to know what was happening before then. You are always, when you are talking about cost of capital in this sense, talking about prospective stockholders. You are trying to say, "What rate of return on my stock prices do I have to have to get new capital into the market?"

A couple of those definitions I read yesterday, one from Dean and one from Harlan, Christianson, where they talk about prospective earnings per share.

Q. You are saying when estimation has been concluded and the facts have been determined by the past record, the facts of rate of return as so determined cannot be used for the cost of capital during [2278] that period under the concept as you understand it? A. You couldn't just average these and say this is the cost of capital.

Q. I said "used." A. In the way I have indicated, if you are going forward, those in the immediate preceding period, as Dean spells out quite clearly, and possibly Anthony—I don't recall—would indicate. You are trying to use the past data to indicate what the future is going to be like.

Q. Are you deliberately escaping my question? A. I am trying not to. There is no need for me to.

Q. Well, thank you very much. Since there is no need, will you address yourself to the question, which I will state again—

Mr. Hayes: May we have it read?

(Question read.)

A. Well, that is obvious, yes.

Q. What is obvious? A. It is obvious that you can't, as I said, just average some rates of return for a period and say that is the cost of capital for that period.

Q. I used the word "used." [2279] A. That is what I was trying to do when I said you would use certain of these in helping you to project. Now, let's not play games.

Q. Let's not please both play games, either of us. A. O. K.

Q. I will avoid playing games if you will. A. I am trying to.

Q. Will you address yourself to my question as to whether this tabulation of rates of return can be used at all, and I don't say exclusively— A. It can be used—

Q. Wait a minute. In 1955 for determining the cost of capital in the prior period, by which I mean not prospectively, in connection with your agreement with Dr. Dean, that rate of return is that which is necessary to attract stockholders and so on.

I understand you to say it can't be done properly? A. I would like to make a little—just a short answer, if I could. I am saying that you can't average backwards and

say that was the cost of capital for that period. You can use the data to help you to project for the future. Isn't that a clear answer?

* * * * * *

[2284] Q. Would you say the same as to disposal values of machinery disposed of in the 16-year period, that that could be taken reasonably into account in comparing cost of ownership with cost of leasing, even though the dispositions had already occurred? A. Let's make sure we mean the same thing by "disposals." You mean the selling of machinery before its life—

Q. What Leidesdorf calls the disposals, in its computations. A. This is the selling of machinery presumably before its useful life is completed.

Q. As a matter of fact, it wasn't selling, under the facts, but this record shows it was the return of leased machines. That is something that happened in the past and is called in the Leidesdorf computation a disposal. [2285] A. That is not right.

Q. What is not right? A. Your definition of disposal. What is meant by disposal is the actual selling of a machine, I believe—that is, the equivalent of selling a machine. You are getting rid of the machine and getting your capital back.

On the return of leased machines, that was not taken account of in the Leidesdorf calculations because they were biased in favor of United Shoe in that respect.

Q. You have been told that that treatment was a bias in favor of United Shoe? A. Look, what I just said was —you were busy over there—

Q. I think I heard you correctly. A. What I said was, returns of leased machines—for example, suppose orig-

inally there were nineteen machines in 1939. If in the process of the years two were returned, this was treated still as though Hanover had nineteen machines. Those returns of that type were not treated as disposals.

Now, that treatment biases the results in favor of United Shoe. In other words, it reduces the [2286] damages, as they calculate them.

Q. Excuse me— A. It raises the cost of ownership.

Q. Where does Leidesdorf calculate the damages in any of these exhibits, Plaintiff's Exhibits 47 and 31, and so on? You don't find the word "damages" there, do you? A. O.K. Let's say in terms of their final calculation, which shows the amount that the company lost as a result of not being able to buy, that figure, that final figure, is smaller as a result of this treatment of returns than it would be if they had actually given—showed those results as having reduced the number of machines they had.

The reason is very simple: They raised the cost of ownership.

Q. Have you finished you answer? A. Yes.

Q. I take it you are not saying that the disposals of the machines, as referred to in the Leidesdorf calculations, is the same as the return of machines by Hanover under the leases, because those facts are not in the Leidesdorf calculations, are they? The return of machines is not in there? [2287] A. The return is not in there, no.

Q. You are expressing no opinion as to whether one is equivalent to the other? A. Whether one is—

Q. Equivalent to the other, namely, disposals in the Leidesdorf calculations and returns under the lease. A. Whether those would be equivalent to one another?

Q. Yes. A. I am not sure what you mean by that. What I understand by "disposals" in that report are the actual selling of the machines. In other words, at the end of the period, in 1955, you say that—you have some machines and they have some value, so you have to give credit for that value in reducing your costs of ownership, you see.

Q. I think we got into this discussion because I was asking you whether the fact that the disposals occurred in the past vitiates them for the purpose of comparison made in this case. A. I think that is right. Maybe what we need is the definition of "disposals."

Q. When you say that's right—. [2288] A. That's right, that we got into this question.

Q. The definition is contained in the assumptions on Plaintiff's Exhibit 41, bottom of page III of the Appendix, which I show you (handing). A. That is exactly what I have been talking about. It has nothing to do with returns.

* * * * *

[2293] Q. So that your intention was to say that for purposes of the Leidesdorf computations, Plaintiff's Exhibits 37, 41, and so on, it is very doubtful or somewhat doubtful— A. It is not clear.

Q. —whether tax considerations should have been taken into account at all? A. Yes. It is just not clear to me on that and I have not thought that through and I am not sure—I don't know of any theory to guide me on this.

Q. You don't know of any theory to guide you on that? A. That's right, period.

Q. I would like you to consider that answer in the light of the heads of the columns or captions in those Leidesdorf

computations, which I remind you are "Net Cost of Leasing" or "Computed Net Cost of Leasing" and "Computed Net Cost of Ownership."

Are you intending to say to the Court that in arriving at computed net cost of leasing and computed net cost of ownership it is doubtful whether tax considerations should be taken into account? A. For purposes of reconstructing the balance [2294] sheet, they were computing to find out whether or not to make a decision to buy. This is perfectly valid. For purposes, as I would classify the Leidesdorf reports of reconstructing the cash flow, it is not at all clear to me that the taxes—"net" then means net cost before taxes.

Q. This means net before taxes? A. Yes.

Q. So that the entire figures would be altered if taxes were taken into account, would they not? A. Sure.

Q. In the Leidesdorf computations? A. Sure.

Q. And in your judgment taxes would have to be taken into account in appraising the net effect of leasing and the net effect of ownership during the 15-year period, wouldn't they? A. Well, again, it depends upon the purpose for which you are trying to get this. There are a number of things one obviously can talk about putting in or leaving out and I think it depends upon what the purpose is.

This is a kind of reconstruction of the flow's net before taxes and doesn't take into account [2295] depreciation, et cetera.

Q. Haven't I sufficiently stated the purpose when I say it is for the purpose of comparing the net cost of ownership and the net cost of leasing, as stated in the Leidesdorf computations? Is that a sufficient statement for you? A.

No, that is sufficient for me. You would have to say comparison for what purpose.

Q. Well, you tell the Court for what purpose a comparison—for what purpose out of these two items, ownership and leasing, the omission of the tax item is proper. A. As I have tried to state to you, the question of making these for the purpose of this reconstruction—I said the use of taxes would be nebulous. It is just not clear to me at this point, for this purpose, whether one should introduce depreciation, taxes, et cetera, or whether it is even possible to do so. I have not investigated those calculations with respect to those issues.

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[2301] *Redirect examination by Mr. Hayes:*

Q. Dr. Cyert, Mr. Carson was just asking you about taxes and reconstructing on profit and loss statement and the balance sheet, and as to whether or not you would give effect to the taxes, and you said that you weren't sure whether you would or wouldn't, and if I recall rightly, you testified yesterday that you considered this a legal question rather than an economic question— A. That's right.

Q. —and if I recall rightly, too, you said something about double taxation, relating it to the field of [2302] public finance. A. That's right.

Q. Will you elaborate on your answer, please. A. Yes. What I tried to indicate was that there is an issue similar —that seems to me somewhat analogous. In public financing there has been this question of taxing corporation income and then taxing individuals when dividends are paid out.

In this case, as a non-legal authority, it seems to me that there is at least an analogous question here. If you take taxes into account in the calculations which is the Leidesdorf calculations, and there is some settlement on that basis—

Q. When you say settlement, do you mean recovery in the action? A. Recovery in the action, right—that this may itself, as I understand it, would then be taxed, which means that you would be taxing the funds twice, so that I would argue that if you made the calculation for recovery purposes, using taxes, in other words, made this after taxes, then what would need to be done in order to put the company back to where it should have been would be to make a settlement large enough so that after taxes—

[2303] Q. You used the word "settlement". That has a technical meaning? A. Recovery, to make your recovery large enough so that after taxes, after taxes it would equal the amount that would be arrived at.

Q. How would you do that? A. Well, with the current tax rate of 52%, in effect what it means is that you want a settlement—a recovery—such that 48% of it would equal the recovery after taxes, so that in effect if you had something like the Leidesdorf calculations, you were going to recover, let's say, the million dollars, then if you divided that by .48, that would give you the amount of money that you needed in order to have recovery after taxes to put the company back where it was or where it should have been.

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[2481] Q. Where do you reside, Mr. Spence? A. 137 East 66th Street, New York City.

Q. What is your business or occupation? A. I am a general partner of the firm of Hemphill Noyes & Company.

Q. Will you state for the record your education and your business experience since you left college. A. I graduated from the University of Chicago in 1929. In the fall of that year I went to work for Standard Statistics Corporation, which is now Standard & Poor's. I was employed there until I went with Hemphill Noyes & Company in February 1934. At that time I was a securities analyst.

About 1939 or so I became head of the research department.

War service from about 1942 to 1946.

I returned and again was manager of the research department. On January 1, 1952 I became a general partner of the firm. About a year thereafter for a year or so I was the partner in charge of research. [2482] I became a partner in what we call our corporate finance department, which is the buying department, underwriting department or whatever name may be given around the Street.

Q. Would you tell us what the business of Hemphill Noyes is. A. Hemphill Noyes was formed in 1915 as a general partnership. It took membership in the leading stock exchanges and has continued in that business ever since. We are both corporate underwriters, retailers of securities, wholesalers and the particular department that I am in, the corporate finance department, has charge of all relations that we have with any corporate clients, whether it be private finances, public, merger, sale acquisitions or any other activity we might have with a corporate client.

Q. In the course of the business of Hemphill Noyes and specifically of your business have there been occasions

when you have advised clients with respect to the financial problems, if any, involved and the courses to be taken in matters such as choosing between purchasing facilities, machinery, et cetera, as against leasing? A. Yes, sir, we have.

Q. In connection with the preparation of your [2483] testimony in this case, have you had given to you Defendant's Exhibit 1, which is the prospectus when there was a sale of Hanover stock in 1956, and Defendant's Exhibit 47, which is a tabulation made, I told you, by an economist called as a witness by the defense? A. Yes, sir.

Q. In addition, have I given you Plaintiff's Exhibits 27, which is the quarterly Hanover cash balances from July 1939 to September 1955; Exhibit 28, which is a Hanover balance sheets from 1939 through 1954; Exhibit 29, the Sheppard and Myers balance sheets from 1939 through 1954; 30, the comparative statements of working capital from 1939 through 1954; 47, the 1938 Hanover balance sheet; 48, the 1938 Sheppard and Myers balance sheet; 49, the 1938 Hanover working capital schedule; 52, the tabulation showing the relation between cost of machinery, rentals paid and assuming the borrowing of the money at a rate of 6%; 53, a similar tabulation at a rate of 2%, and 54, a tabulation showing loans made by Hanover? A. Yes, sir, you have.

Q. In addition, have I given you three pages which I told you contained paragraphs 7, 8 and 9 of a stipulation of facts entered into in a prior trial in this [2484] action? A. Yes, sir.

Q. And in connection with your testimony have you studied those various documents? A. I have, sir.

Q. Mr. Spence, will you direct your attention first to Defendant's Exhibit 47, which is the tabulation I told you was prepared by an economist called as a witness by the defendant. A. Yes, sir.

Q. Do you have it before you? A. I have it before me.

Q. I direct your attention further to Table I of that exhibit, which is headed Sales of Common Stock to Members of the Corporate Family. A. Yes.

Q. Do you have it? A. Yes, sir.

Q. There has been introduced in evidence in this case, Mr. Spence, testimony and documents to the effect that the sales set forth on Table I of Defendant's Exhibit 47 were in part sales to the existing stockholders of Hanover, of whom in 1939 there were just six, all of whom were members of either the Myers family or the [2485] Sheppard family, the elderly Mr. Myers and Mr. Sheppard having organized the company around 1900; that the balance of the sales set forth on Table I were sales to key employees, made to them for the purpose of—as a reward for past services and as an incentive to their continued employment in the company; that there existed also among all of those who held stock in the company an agreement whereby no stockholder could sell any stock he held without first offering it to one of the six stockholders in 1939 who had a certain period of time in which to elect to purchase or not, and if the stock was not purchased by one or more of those stockholders, then to offer it to the corporation, and if the corporation didn't buy it, then the stock was free and the stockholder could sell to whomsoever he pleased.

It was further a part of the agreement among the stockholders that at the time of any sale the sale would be

made in accordance with the formula which provided—I mean a sale by a would-be stockholder to the others or to the corporation—which provided in substance that the sale would be at the book value of the company, except that inventories were to be taken in at 85% of book value—let's see, there was one other consideration I wanted to get in here—oh, further, that [2486] when the policy was initiated in 1940 of selling stock to employees, the price to the employees would be based on exactly the same formula, to wit, the book value of the corporation, discounting the inventories, however, by 15%, and that all of the sales set forth on Table I of Defendant's Exhibit 47 were all made, whether to family or employees, at the discount book value which I just mentioned to you.

Now taking those facts into consideration are the sales prices set forth per share on Table I of Defendant's Exhibit 47 in your opinion any measure of the market value of the stock or of what the public would pay for the stock? A. No, sir, not in my opinion, when I examined these figures, and, for instance, in 1948 the sale prices are approximately—I would say are not even two times earnings. The ratios do vary from year to year but it is very obvious to me that such prices at such low earnings ratios would have no merit at all in a free and public market. It would be ridiculous to pay two times earnings I think for something like this.

Q. What are your reasons for stating that opinion, Mr. Spence. A. Well, normally, common stocks are valued in the [2487] market—I would say one of the first considerations would be earnings, the position of the company, the conditions in the economy and particularly the record of

the company in its industry. There is an old rule-of-thumb which still is a fairly handy thing to have that ten times earnings is your first look. You would evaluate that and define it, but when you get two and three and four times earnings, that is very, very unusual. Usually to get an explanation for it, but not with a record such as this company has.

Q. Say that again. A. I said usually there is a good explanation for it, but not with a record such as this company has, where it may be the earnings have fallen off subsequent, but with a company that has an impressive record such as this one, I would say two times earnings is a ridiculous price.

Q. What if anything significant has book value in determining the market value of a stock or the market price of the stock in an industry such as Hanover? A. In almost any corporate industrial security I'd say book value has virtually no bearing. It might have on a mutual fund or something like that but it would be one of the very, very minor considerations in [2488] evaluating an industrial corporate stock.

Q. You mentioned a rule-of-thumb of ten times earnings. Will you turn, please, to Table II, which is page 3 of Defendant's Exhibit 47. A. Yes, sir.

Q. You will note that for each of the years there is set forth in one column stockholders' equity as of the end of the preceding year, the net profit after taxes for the current year, and a rate of return which is nothing more or less than a net profit after taxes, divided by the stockholders' equity at the end of the preceding year.

In your opinion, Mr. Spence, what significance has the rate of return arrived at by dividing the preceding—the

stockholders' equity, rather—into the net profit after taxes —I am sorry I lost my question. I will start over again. I have forgotten how I started.

In your opinion, Mr. Spence, what significance is a calculation which arrives at a rate of return which is merely a percentage determined by dividing the stockholders' equity into the net profit after taxes in determining the market value of a security? A. Well, again I would say very little. I think we always look at the earnings per share rather than [2489] the rate of return on the equity at one particular period. I will say that these are very handsome rates of return, and therefore might have some bearning in a comparative evaluation of stocks, but again I think that the determination of market value in a free market is going to be the trend, and the amount of earnings per share, of financial position in the industry and the general economy. In other words, I don't think that this in itself has any bearing on what the market price might be.

* * * * * *

[2492] This, remember, was a privately-held corporation at that time. The stock market at that time was not particularly favorable to new issues, although it was beginning to show some improvement. I think when you had examined a company that had a net worth of $4.3 million at the end of 1938, unencumbered assets; net fixed assets of $1.4 million, investment in a subsidiary; working capital of $2.4 million and only one liability really of something like $87,000 for taxes, that you would have determined that the cost of going to the public for $500,000 of equity would probably be prohibitive when it was very

apparent the company could borrow that money on probably very favorable terms.

At that time the prime rate was 1½% for commercial bank loans; we had an Administration in power which was committed to easing money and low interest rates, our advice, I am positive, would have been that you should go to your local bank and see if you can't get either a line of credit in this amount or take it [2493] on a normal bank loan. We could have talked with them, I presume, about the possibilities of taking a long-term insurance loan, which would have been at a higher interest rate; we could have imposed certain restrictions which are typical insurance company loans, and as I say, I presume as an investment banker we would have outlined to them the many advantages that also go with a publicly-owned company, but I am sure that for that amount of money in 1939 they couldn't in all conscience recommend that they go with a public equity issue.

Q. And do you understand your answer in substance to be that you would have advised them to buy the machinery and to finance it— A. Yes, to buy it. I think the arithmetic shows very obviously that buying it was more favorable than renting it.

Q. And to finance it if necessary by borrowing from a bank? A. Yes, sir.

Q. And you mentioned the prime rate was 1½%. In your opinion, at what rate could Hanover have borrowed from a bank at that time? A. In my opinion they were a prime credit, but [2494] certainly they would not have had to pay more than ½% above the prime or say 2% at the maximum.

* * * * *

[2514] Q. Have you observed in the business world recently a rise in leasing companies and a growth in leasing practices?

* * * * *

A. Yes, sir, there has been quite an increase.

Q. There has been a great increase in recent years, has there not, in the leasing of equipment as [2515] against the purchase? A. Yes, sir.

Q. Is it not true that a great number of different commodities have been put on that basis; such as earth-moving machinery, trucks, farm tools, as well as automobiles, passenger automobiles? A. It is possible to lease almost anything today, I would say.

Q. To what do you as an expert attribute the rise in these leasing practices? A. I think our present tax structure is a very important part of it. Then I think also it is the measurement of a company that has a certain amount of capital—it is just a question of arithmetic: it is better for them to use their capital in some other phase of their business or is it better to lease or own, and I think possibly, as I say—actually I think our tax structure is one thing that has contributed tremendously to this leasing.

Q. That is the tax structure that has been in existence since 1939? A. At different rates.

Q. And the leasing practices we speak of have been growing since that time? [2516] A. They have been.

Q. You just now said that it is a question of whether it would be better for a company to use its capital in purchasing a given thing rather than use it elsewhere; how would you measure "better"? A. I think it is just a pure question of arithmetic. If it is going to cost you so

much in rents to lease the same amount of money you could use to purchase, perhaps you could use it in your business some other way. I think it is a matter of arithmetic. Often the decision is made to buy rather than to lease just because on arithmetic they think they will come out in the long run with better earnings overall. I don't think you can make any decision that it is better to lease or it is better to buy until you examine all the facts in each particular case.

Q. You have to examine all the facts in the particular case, do you? A. That's right.

Q. Would you yourself advise a client, a corporate client which raised its money by public issue at, say, twelve times earnings, to put the proceeds of the issue into the purchase of a fixed asset or of any asset of substantial size which would yield less than [2517] twelve times earnings? A. Which would yield less than—

Q. Which would yield a lower return. A. No. I think they should attempt to at least maintain their return or improve it if they can. We come back to a question of arithmetic. It is possible, however, that sometimes you must buy machinery or have your return go down. There is a question of obsolescence, new practices, new developments, where it may require you to spend money, even though you can't maintain the return. It is pretty much arithmetic, your best judgment at the time.

Q. If you have a choice between leasing and purchasing you can obviate the risk of obsolescence by leasing, can't you? A. Usually.

Q. So that when in your previous answer you spoke of having to invest capital at a poorer rate of return because of obsolescence, you were assuming that the customer or

client already owned the asset; is that it, the machinery? A. I didn't particularly have that in mind; I just meant that that was one factor that must be considered, among others.

[2518] Q. What other factors must be considered? A. Well, as we said, return—in other words, the arithmetic of it—if we have a piece of equipment that costs X number of dollars and we can rent it for a certain term at a certain figure, or we can put the capital in and buy it—now, which is going to be more favorable to us? In other words, can we buy this and earn enough on it so that we are better than if we rented it and paid all these rentals on it?

Q. I am just trying to get you to tell us what you take into account in the arithmetic, and let me ask you some leading questions. Would you take into account depreciation? A. Yes, sir.

Q. Taxes? A. As a refinement, yes.

Q. Refinement? Isn't that a prime element, the taxes? A. Yes.

* * * * *

[2521] The Court: If Hanover had purchased this machinery for about $600,000, as Mr. Hayes indicated, [2522] in 1939, and financed the purchase by a bank loan at about the prime or half-above-prime, what might have been the other terms of that loan? Would it have been a demand loan? It would be, wouldn't it?

The Witness: It would be or could be. In that case, at the prime rate, it would probably be a one-year loan.

The Court: If the prime went up, the interest rate would go up, wouldn't it?

The Witness: It would, sir. Of course we know what happened, but the only thing I think you could say on that is that a company with that credit would have no problem in renewing the loan.

The Court: It would have to be renewed at a higher rate if the prime increased?

The Witness: Yes, sir.

The Court: What were the prime rates?

The Witness: I stated 1½ per cent.

The Court: In 1939. What were the prime rates after that?

The Witness: The first change was in 1947 when I think it went to 1¾ per cent. It stayed at 1½ through 1947.

The Court: It is a little more than that today, [2523] as I remember.

The Witness: I think the risk you could measure there was that we had this federal administration was committed to lower interest costs.

The Court: I don't think there is any doubt that a company like Hanover would qualify for either the prime or not greatly in excess of it.

* * * * *

[2422] Q. Now you have before you, Mr. Laird, Plaintiff's Exhibit 92 for identification. Wll you tell us what that is? A. That is a copy of the minutes of a special meeting of the stockholders of the Hanover Shoe, Inc., of June 26, 1939.

Q. And is there anything attached to it? A. There is nothing attached to it. There is incorporated in it—

Q. Pardon me. Incorporated in it— A. —copies of a certain stockholders' agreement, accompanying agreement.

Q. Did you prepare those minutes? A. I did.

[2423] Q. And the accompanying agreement? A. I did.

Q. How many stockholders did Hanover Shoe, Inc., have at that time? A. In June 26, 1939, they had six stockholders.

Q. And were they all members—how many families were represented? A. Two families, the co-founder, C. N. Myers, and the family of co-founder, H. D. Sheppard.

Q. And of those six stockholders were any of them officers and/or directors of Hanover at that time? A. C. N. Myers, H. D. Sheppard and Lawrence B. Sheppard were all officers, were all directors, and up to a short time before this were the original—comprised the whole board of directors. There were three directors and they were all principal officers of the company and its subsidiary until shortly before this, probably a year earlier, two other directors were added, they being sons, other sons of H. D. Sheppard and C. N. Myers, respectively.

Q. Now, with respect to the three who you said were the—up to 1939, say— A. Around '38.

[2424] Q. —were the only directors and were also officers, one was a—were the two other than Mr. Lawrence B. Sheppard and the Mr. Myers who had started the company around the turn of the century? A. Right. Mr. H. D. Sheppard was the father of Lawrence B. Sheppard.

Q. Right. Now, will you tell us what the purpose was for the stockholders' agreement which you drafted and

which was approved by the stockholders as appears in Plaintiff's Exhibit 92 for identification?

Mr. Carson: Objected to as varying a written document, and irrelevant.

The Court: What is the purpose of the question?

The Witness: The purpose—

Mr. Hayes: This has to do with the foundation that I promised I would put in while Dr. Cyert was on the stand.

The Court: Overruled.

A. Well, the purpose is as recited in the document itself.

Q. I know. Can you summarize it for us, Mr. Laird?

[2425] Mr. Carson: Same objection, your Honor. We have the document.

The Court: Yes, it is a written agreement.

Mr. Hayes: All right. I offer in evidence Plaintiff's Exhibit 92 for identification.

Mr. Carson: No objection.

The Court: Admitted. This document speaks for itself.

Mr. Hayes: Yes, I suppose so.

Mr. Carson: Too bad, but it does.

(Plaintiff's Exhibit 92, previously marked for identification, received in evidence.)

Q. Did I ask how many stockholders there were at the time? A. Six.

Q. Did there come a time when the number of stockholders increased? A. It did.

Q. Will you tell us how that came about? A. Shortly after the stockholders' agreement was executed in June of 1939 discussions were held with the officers, at which I was present, and both the advisability of distributing some stock by sale to some employees of the company, to bring to an end [2426] the family corporation, in which all stock was held by six members of the two families, to make some distribution among certain employees who were generally referred to as key personnel.

There was no stock available to issue at the time and, as I say, I left the company in 1939, shortly after this agreement was made, and returned in 1940..

When I returned in 1940—the beginning of '40—there were still further discussions about this and it was decided to amend the charter and increase the capitalization, the number of shares, from 101,000 to, I recall, 200,000 shares of stock.

[2427] Q. Had all the authorized stock prior to that time been issued? A. It had all been issued. That was done a few months later, later in 1940—this charter was so amended. There were discussions in the interim and Mr. Lawrence Sheppard, to initiate this program, transferred 50 shares of stock standing in his name to five employees, 10 shares each. Almost immediately after the—

Q. Was that a gift or a sale? A. I think that was a sale. I cannot be bound by that answer. I can't recall. I am quite certain it was a sale. A very few days after the charter was amended and some 99 more shares of stock were available for issue—

Q. You mean 99,000? A. 99,000—a discussion followed concerning how many shares might be distributed. It is

my recollection that the board of directors finally authorized the issuance of somewhere between five and ten thousand shares of stock. Mr. Lawrence Sheppard was very insistent that he wanted to make an immediate distribution of 2500 shares. That I remember well. [2428] The other stockholders, not these five who had received the ten shares each, and who were going to receive part of this next distribution—the original six stockholders wanted some stock. They felt they would like to have some more too, so some resolution was adopted authorizing the issuance of somewhere between five and ten thousand shares and 2500 of that was taken by Mr. Lawrence Sheppard and almost immediately distributed among those five employees to whom he had earlier in the same year distributed 50 shares. The other stockholders took up part of the offer. I recall that Mr. C. N. Myers said he didn't want to take any more stock, but his son and daughter, Mr. Lawrence Sheppard, and his brother, did take it, and Mr. H. D., the senior member of the firm, took a few shares. I don't know how many were taken or the amounts they took, but I do recall they didn't take quite all of the offer. There was a little left in that particular offer that was not issued. That resulted in the immediate distribution of 2500 shares more of stock to the five employees.

Q. The stockholders' agreement which is incorporated in Plaintiff's Exhibit 92 contains a price formula for sales among those six stockholders or sales back to the [2429] corporation, does it not? A. That's right.

Q. Was there any price formula arranged among the officers and directors at the time the decision was made to sell to employees as to the price employees should pay?

A. Yes; the exact formula as set forth in the stockholders' agreement made by the six original stockholders in 1939. In fact, all stock purchased by employees was to be held in strict accordance with the provisions of the major stockholders' agreement that had been made in June of 1939 as to transferability—it was to be restricted in the same manner and if transferred was to be transferred under the same procedures as set forth and at a price arrived at under the exact formula, and each stock certificate was stamped on its face with a note that the transferability of this stock, represented by the certificate, was restricted by the provision of a certain agreement of June 22, 1939, on file with the company. We said it could be examined there, or something to that effect. They held their stock under the same restrictions as the six originals did.

Q. Were further shares of stock sold to employees [2430] after 1940? A. Oh, yes. There were a number of sales.

Q. Suppose I, to make it short, told you that the record shows there were sales in 1941, 1942, 1948, 1949, 1950 and 1951; would that generally accord with your recollection? A. Yes, and after 1951.

Q. Yes. I am thinking at the moment just down to 1951. A. Yes.

Q. You have before you Plaintiff's Exhibit 102 for identification. A. Yes, sir.

Q. Would you tell us the circumstances for the making—which apparently is an agreement among various shareholders, other than the members of the family whom you mentioned—will you tell us the circumstances which led

to the making of this agreement? A. When the early shares of stock were transferred to employees it was felt that marking them on the face with the notice that they were held under the same conditions as were set forth in the major stockholders' agreement of 1939 was satisfactory and the first stock sold—on the first few blocks of stock [2431] sold to employees there was no written agreement made with those employees. They were bound by this agreement and that was felt sufficient.

Q. When you say "this agreement," you mean the 1939 agreement? A. Yes. I don't know how many shares were transferred under those circumstances, but there came a time when we realized that while they were bound by the same conditions as were set forth in this agreement, this agreement of the six original stockholders didn't require them ever to offer their stock or sell it; they might hold it indefinitely. This only prescribed the manner in which they could sell it if they chose to.

Q. By "this agreement," you refer to Plaintiff's Exhibit 92? A. Yes. It was realized that the employees who had been granted the privilege of buying stock under a verbal understanding, that if they left the company they would not take the stock with them but would within a reasonable time offer it back to the company or to the major stockholders—it was felt that that probably ought to be reduced to writing and within five years after the first stock was issued to employees—I don't remember the date—an agreement was drawn and all [2432] employees who then had stock agreed that they were preparing this document in confirmation of a verbal understanding that accompanied their purchase of stock, to the effect that if their employment terminated for any cause

whatsoever they would offer the stock, within a prescribed time—I think it was by March 1 of the year following the calendar year in which their employment terminated—they would offer the stock to the six original family stockholders.

Mr. Carson: Excuse me. If this is in writing, I think we should have the agreement.

The Court: Is this Exhibit 102?

Mr. Hayes: This is the circumstances leading up to 102.

The Witness: We don't have that in writing. This agreement I am talking about was made probably in 1944 and the employees, up to that time, who had purchased stock signed that document.

Mr. Carson: Signed what document?

The Witness: That we prepared in 1944.

By Mr. Hayes:

Q. Were the 1944, and up to 1953—do there now exist any written agreements that were entered into between employee stockholders between November 1944 and [2433] 1953? A. No.

Q. What happened to them? A. They were destroyed.

Q. At what time? A. Well, I don't know.

Q. Was it at about the time that Plaintiff's Exhibit 102 for identification was— A. Yes. Thre was no need to hold them any longer. Plaintiff's Exhibit 102 brought everything up to date.

Q. What was the purpose of the company and of the officers and directors in permitting employees to purchase stock?

Mr. Carson: Objected to. Irrelevant and not the best evidence.

The Court: Is this part of 102?

Mr. Hayes: To a degree it is, your Honor, in so far as 102 goes back to 1944, but it doesn't cover the purchases made in 1940 and 1941.

The Court: Doesn't cover what year?

Mr. Hayes: If you have Plaintiff's Exhibit 102 before you, your Honor, you will see it refers to, from time to time, beginning in November '44, they were permitted to purchase certain stock—Mr. Laird [2434] has testified that originally there were only oral agreements, so that the references here would seem to cover only the sales to employees since November 1944. Mine is a general question covering all sales to employees, including those where there were oral agreements.

The Court: Doesn't 102 speak for itself in so far as the sales from November 11, 1944 are concerned?

Mr. Hayes: It does. It doesn't cover the sales in 1940, 1941 and 1942.

The Court: I sustain the objection in so far as it applies to the sales before 1944.

Q. At the time the policy was adopted in, I think you said, 1940, of selling stock to employees, key employees, what were the purposes of the Company in doing so? A. The purposes were as a major reward for services rendered by key personnel, as an incentive to key personnel, by providing that they would have some proprietory interest in the company for which they were working, have an opportunity to share in any success that the company

might have, the rewards of successful operation. That was just about the purpose in offering them stock.

[2435] Q. Were there any other purposes that occurred to you? A. Well, the purpose in deciding to make stock available to employees included one other factor: It was realized that we had to bring in more executive employees. We knew that. The founders were getting old and their work was tapering off and we were finding it difficult to get top-grade executives, which in most cases you had to draw from another company, by mere payment of salaries. The tax picture being what it was, a generous salary was not enough inducement, in many instances; they wanted an opportunity to get equity in the company, buy stock in the company, and this offer to allow them to purchase stock we found to be quite an inducement in some instances.

Q. Who drafted Plaintiff's Exhibit 102 for identification? A. I did.

Q. And you are a signatory to it, are you not? A. I am, yes, sir.

Q. Was that signed by all the then employee stockholders? A. All that held stock at that time.

Mr. Hayes: I offer it in evidence.

[2436] Mr. Carson: No objection.

The Court: Admitted.

* * * * *

## Excerpts from Separate Trial on the Passing-on Issue Before Goodrich, J.

Direct Examination—Lawrence B. Sheppard

(61) Q. Now, let me direct your attention for a moment, Mr. Sheppard, to the retail prices at which the shoes are sold in the stores. What are the factors which entered into the fixing of the retail prices in the stores? A. Well, the factors—the principal factor in fixing (62) retail prices in our stores is competition. Of course, increases in raw material or labor usually affects us all, I mean, the entire shoe industry. However, we must fix our prices at the retail level so that we are competitive at all times. If we did not do that, it would be fatal to our business. It is a creed with us. It is a creed. It is essential, mandatory, that we must get our share of the men's shoe business in any given locality in which we are located or hope to get a lead in.

Q. Did you also participate in discussions or decisions made with respect to retail prices of Hanover shoes in the retail stores? A. Always.

Q. During the whole period of sixteen years? A. Yes. sir.

Q. Was there ever any price change made in the retail prices without consideration being given to the prices of competitors shoes? A. No, never. It could have been fatal if we had slipped on it.

* * * * * *

(63) *By Mr. Hayes*:

Q. Mr. Sheppard, directing your attention to the discussions having to do with the fixing of the prices to Sheppard & Myers, in any of those discussions was mention ever made of the cost of machinery leased from United Shoe Machinery? A. Never.

Q. In any of those discussions, was mention ever made of changes or variations in the cost of machinery leased from United Shoe Machinery Company? A. No, never.

Q. Directing your attention now to discussions having to do with the fixing of retail prices in the stores, was mention ever made in those discussions of the cost of machinery leased from the defendant, United? A. Never.

Q. Or in such discussions having to do with retail prices, was mention ever made of changes in the cost of machinery leased from the defendant, United? A. No.

* * * * *

Q. What elements were considered in fixing the billing price to Sheppard & Myers? A. Most generally anything that took a sudden jump and looked like it was going to be permanent. It so happens that the only major items, and I referred to major items in my previous sentence; the only major items that give you serious headaches was a sharp increase in labor at certain times, and hide and leather prices almost constantly. That was very frequent. Now, they were the two big things that we did practically all of our discussing about and the two big things that would cause shoes prices to go up and sometimes to come down, although you'd have to cut labor off; labor never came down, but the raw materials did and prices follows the—pretty well followed the trend of the raw material market. It wasn't—these meetings weren't all to raise prices; many of these meetings and conferences were to lower prices, and there, when that happened, it was always raw materials is what made it possible.

* * * * *

(110) *Redirect examination by Mr. Hayes*:

Q. You were asked on redirect, Mr. Sheppard, and if I recall correctly it was stated that material price changes did not affect your billing prices or your retail prices. Would you please explain how Hanover Shoe Company purchases and handles its inventory of leather and hides?

A. Since long ago I went with the company in 1921 the Hanover Shoe Company was unique, I think, among all shoe companies in its purchasing policies. My father taught me when I came there to buy when the other—when the competitors, other manufacturers, did not want to buy, and not be afraid to buy. The policy I inherited from him I practiced all my life, and we have been well known throughout the leather and shoe industry for buying huge quantities of materials at times when others hesitated to buy or did not want to buy for some reason, and consequently we were able in many, many instances to ride out the peaks and vallies of the leather market.

As I believe I said on the witness chair today, we carried huge and do carry huge raw material inventories that are not comparable to the inventories of most shoe manufacturers. They are much, much larger. Now, that permites (sic) us when we choose to do it to absorb numerous minor increases, and there is no (111) effort made then and at that time to put ourselves on what you might say the current market, and I didn't say in this respect that an increase or a decrease of three or four or five cents a pound would not cause use to increase the price of shoes, either billing or at retail, particularly the retail, because it must be borne in mind that our retail prices nearly always go up and down in units of either fifty cents or a dollar; never five, six, seven, twelve cents; never.

Now, this jumps your retail prices fifty cents, might not sound like much of a jump in a pair of shoes, but that fifty cent jump can hurt your competitive position under certain circumstances. There are other times when the jump of a dollar, which is rather infrequent, would hurt you less than a fifty cent jump at another time, but those increases are never less than fifty cent units, and I would like to say this if I may.

The billing prices to the stores—Again I repease (sic) that is an interoffice—inter-official act. The important act of those same officials is when they tamper with the retail price because the one company is wholly owned subsidiary of the other company. It is just a question of which pocket it comes out of actually, but that doesn't affect in itself the buying public. It is a retail price that the buying public pays. It doesn't have anything to do with this intercompany billing price.

• • • •

Direct Examination—Robert M. Laird

• • • • •

(120) Q. Was there some operating reason for that, Judge Laird? A. Yes. The changes to Sheppard & Myers were very often changes of ten cents a pair, 15 cents a pair, 20 cents a pair. In the retail field we couldn't make that type of change. I might put it this way: It was 50 cents or nothing. We weren't compelled by law to make it 50 cents or nothing, but historically the only one of two changes in my time were 50 cents or a dollar up and down, and we couldn't keep changing ten cent changes, and 15 cent changes, without destroying our whole pattern and our historical position with the men's shoe buying public that we had the fixed price, a line price.

Q. What was the reason for the lesser changes made in Sheppard & Myers billing prices? A. Well, they were in a sense interdepartmental. They were intercompany, but they were intended to reflect factors that we considered an increase or decrease to the subsidiary company certain factors that we considered, and those changes were made to reflect that at least in part, or to the extent we thought they ought to be reflected by our record.

Q. What factors were they? A. Material market, largely leather hides and leather. I don't remember of ever hearing discussed thread or nails or (121) wax or dressing, but always it was confined to hides or leather, and there were interrelated or labor charges.

Q. Now, in any of the discussions in which you participated with respect to the possible changes in the billing prices to Sheppard & Myers, whether that eventuated in changes or not, was the cost of the shoe machinery leased from United Shoe Machinery Company ever mentioned? A. It was never mentioned in my hearing.

Q. In any such discussions were any changes in the cost of the machinery leased from United Shoe Machinery ever mentioned? A. Never in such conferences. I don't mean to say that I did not know that changes were made in the cost of the machinery, but they were never mentioned in any discussion or conference that had to do with the question of whether our price should be changed or unchanged —remained unchanged.

Q. With respect to any such discussions relating to changes in retail prices, whether the discussions eventuated in changes or not, was the cost of machinery leased from United Shoe Machinery ever mentioned? A. Never.

Q. Or were changes in the cost of shoe machinery leased from United Shoe Machinery Company ever mentioned? A. Never.

* * * * *

Redirect Examination—Robert M. Laird

(126) *By Mr Hayes*:

Q. Toward the close of yesterday's session, Judge Laird, you mentioned in response to a question, that so far as the retail prices in the stores were concerned, in addition

to material and labor there were also mentioned matters of taxation in the various states in which the company maintained retail stores. Will you please state, what if any other matters were considered in the fixing of retail prices in the stores? A. Well, in addition to the major factors of cost of material in the shoe and the cost of labor in the shoe, there was the factor of cost of labor in selling the shoe with upwards of four hundred employees involved in the sales personnel of the subsidiary company and a payroll of more than $1,000,000 a year. That was a major factor because it changed from time to time.

I have mentioned local taxes in the jurisdictions where our various stores are located, franchise taxes, doing business taxes, and cost of various types of taxes always changing.

There was the matter of rental of store sites (127) involving upwards of a million dollars a year and changing, because our average lease is probably slightly over five years—between five and seven, which means that anywhere from a dozen to three dozen leases expire each calendar year, and during the last ten or twelve years the trend has been steeply upward on retail leases. I say that with hesitation since the landlord of our local store is present, but when leases expire we generally find we have to go up on a renewal. Those things are taken into consideration, not all of them in every one of the conferences, but all of them at one time or another during a given period, and since those conferences which result in retail price changes probably average only one a year—I think in the sixteen years covered here—there were less than sixteen retail price changes, and if we set aside one short period of a few weeks in 1951 when we made three, why, there were only

probably ten or eleven price changes in the sixteen years, so that these factors can change materially between one price change and the next price change, and over and above all these factors, and overriding them immeasurably is the question of our position with reference to competition.

That involves in each instance a detailed study of valuation, a review and appraisal of what competition has been doing recently, what insofar as we know they are about (128) to do, and our judgment as to what they must do and will do or will likely do in the rather near future. That is the major consideration in my opinion when we come to settling or determining changes or non-changes in retail prices.

Now, in our billing prices between the two companies we have absolute control of the price picture. We can do as we please. We try—we endeavor to set these prices realistically, just as business policy dictates we should, not out to try to fool ourselves. It is all right to fool our competitors but not ourselves. These intercompany prices will not affect one iota the consolidated gain and loss, profit and loss, financial statement and balance sheet at the end of any year. All that has happened in those instances, we have reached in our left pocket and transferred some of the profits, if we had any profits to earn, to our right-hand pockets, but in retail price setting that is not true.

An error there will quite often result in finding that our competitors have their hands in our pockets, and that will be reflected on the final balance sheet at the end of the year. To a large degree, our competitors set our retail prices. Certainly they set definite limitations in which we can make and maneuver our prices.

In a given category or classification of our shoes, a price line, a certain price line, I think it is a (129) fair

statement to say that competition at least sets a ceiling on that kind of shoe, a ceiling price on that kind of shoe just as effectively as the OPA did with their ceilings. We could not go beyond the ceiling that OPA set for local prices. We can't go beyond the ceiling the competition has set in that given category of shoes for economic reasons. We will go broke if we do because we will lose the pairage and the volume.

* * * * *

(130) *Recross examination by Mr. Kiendl:*

* * * * *

Q. But now, Mr. Laird, is it fair to say that you have had an opportunity to explain all the factors and all the considerations that influence the judgment of these meetings that you had in fixing both billing prices and retail prices? A. I have had a fair opportunity—I think I could have missed something, but I think I have had a fair opportunity. I think I have.

Q. Would it be fair to say that in none of those discussions, the sixteen times that retail prices— A. I don't think it was sixteen. I think it was fourteen or twelve.

Q. I think you said it was less than sixteen? A. Yes.

Q. Whatever it was. A. Yes.

(131) Q. In all those times there was never mentioned any factor costs other than those items you have given? A. Never.

Q. Rentals and royalties were never mentioned? A. Never.

Q. Machinery costs were never mentioned? A. No.

Q. And all those items that entered into manufacturing expenses other than material and labor were never mentioned? A. Never. • • •

• • • • •

**Plaintiff's Exhibit 24**

[LETTERHEAD OF]

NATIONAL SHOE MANUFACTURERS ASSOCIATION

Chrysler Building—Room 940

New York 17, N. Y. MUrray Hill 9-8114

August 29, 1950

To: Technical Committee

Charles H. Jones, Jr.
Allen Cadwell
B. A. Gray
Charles F. Johnson, Jr.
Warren Reardon
L. B. Sheppard
S. L. Slosberg
Weir Stewart

From: W. W. Stephenson

Following the meeting of the Technical Committee which was held in New York last week, I have undertaken to draft an outline which with proper scrutiny by the members of the Committee and necessary redrafting, might become the written or oral statement from the Committee to the United Shoe Machinery Corporation.

This outline covers the various points that were brought out in the Committee meeting, but is couched in general terms and may require some documentation.

Unless the Committee is prepared to adopt a very vigorous position in its dealings with the United, in my opinion there is no purpose in continuing the protest in which case it will be necessary for the Committee to

report its impotence to the Board of Directors and to the membership.

I have no pride of authorship about the enclosed outline, either as to phraseology or suggested policy and procedure. My intention has been to provide a starting point from which the other members of the Committee could offer constructive criticism and suggestions for a course of action which would justify the efforts of the Committee. If it is the decision of the Committee to pursue the question of old machines which have been amortized many times over, then each member of the Committee should compile and furnish to us a considerable list of such machines with their history as to date of installation, total payments to United, etc.

*Plaintiff's Exhibit 24*

[LETTERHEAD OF]

NATIONAL SHOE MANUFACTURERS ASSOCIATION

August 29, 1950

STATEMENT FROM THE TECHNICAL COMMITTEE TO THE UNITED SHOE MACHINERY CORPORATION

Since the initial impact of the unit charge increases announced on July 31, the Technical Committee of the National Shoe Manufacturers Association has given serious thought to the effect of these increases, and particularly to the trade relations between the industry and the United Shoe Machinery Corporation. In addition to its own deliberation, the Committee has availed itself of the advice and opinion of a large number of manufacturers who are members of the Association, but not on the Committee. Certain opinions have been formed, which while not fully conclusive may be said to constitute the studied attitude of the Committee, and we believe that this attitude will be concurred in by the vast majority of shoe manufacturers. Certain conclusions and recommendations are set forth below.

The Committee recognizes that any company doing business today is faced with increased costs, many of which cannot be controlled and it is recognized also that the management of a corporation has the responsibility to earn a fair return for its stockholders.

If shoe manufacturers increase prices, as all of them have done several times during the past ten years, their customers have the privilege of examining the new price schedule and making a determination as to whether they

will pay the new prices or buy their shoes elsewhere. Under these circumstances and under the pressure of strong competition from many other producers, shoe manufacturers can and do increase and decrease their prices without prior consultation with their customers. Since the customers of the United Shoe Machinery Corporation in most instances do not have the privilege of similarly evaluating a new price schedule and similarly accepting or rejecting the goods and services of the United Shoe Machinery Corporation, the Committee feels that any action as drastic as the one taken on July 31 should be taken only after a frank and complete discussion with representative members of the industry and after consideration has been given to all factors affecting both the Corporation and the industry. Such a discussion held in a spirit of friendly cooperation and understanding might be expected to develop a rate structure which would meet the financial needs of the Corporation and at the same time would be one which shoe manufacturers could understand and accept. In the absence of any such cooperation by the United Shoe Machinery Corporation with representatives of the industry, this Committee must of necessity hold its deliberations in the light of such facts as can readily be obtained.

From a study of such available material, which includes the earnings record of the Corporation for the past ten years, the Committee is not convinced that the additional revenue which will derive from the new rate schedules is required to keep the Corporation in sound financial condition and to preserve earnings records consistent with the history of the Corporation.

The above statement is made despite a reluctance on the part of the Committee to place itself in a position of judg-

ing what the proper earnings of any company should be under the free enterprise system. Nevertheless, since the statement made by the president of the Corporation to representatives of the Committee on August 7 emphasized that the unit charge increases effective July 31 were essential to bring the earnings of the company up to what the officials and stockholders deemed an appropriate level, the Committee feels that on behalf of the industry and the companies represented by its members it has the right to probe this particular question, especially since the additional revenue derived from the increases will come out of the pockets of shoe manufacturers. This is particularly true since the only choice a shoe manufacturer has is to pay the increases or stop making shoes.

Based on previous discussion with United officials, and a study of past records, the Committee is frankly puzzled by the apparent inconsistency between the expressed need of the Corporation for very substantial increases on specific machines and the claim that increased overhead costs must apply to all machines, therefore increased total revenue is necessary. To be more specific, there are thousands of "old" machines in use throughout the industry which have returned to the United thousands of dollars per individual machine over and beyond the initial or replacement cost of such machines. It is inconceivable to the Committee that up to 100% increase is necessitated on any of these "old" machines in order to make them profitable. It also is inconceivable that these fully amortized machines should be charged with any substantial part of research and development costs, particularly since newly developed machines which come out of Beverly invariably are offered

to the industry at rates which would appear to include development costs when these rates are compared to rates on the machines which they displace. While it may be claimed that these newly developed machines, in addition to being expected to defray their cost of development are more efficient, and therefore are profitable to shoe manufacturers at the higher rates, it is the feeling of the Committee that the shoe industry has not shared equitably in the profitability of new machines which have been developed in recent years.

In this connection we call attention to a publicized report purported to have been made in 1946 by G. L. Leinau of the United Research Division to Clifford Roberts to the effect that terms on newly developed machines are "predicated on taking all of the direct labor saving that will result from the use of these machines and in some classes of shoes, taking a bit more." The subject of rates on newly developed machines is introduced here because it forms an important part of the whole question of rate structure and in the opinion of the Committee such rates have been fixed without due regard to the cost savings which the new machines will effect for the manufacturers who use them.

From the foregoing it must be apparent that there are a number of important points on which there is disagreement between the United Shoe Machinery Corporation and this Committee. The Committee believes that these differences should be resolved in an atmosphere of friendliness and understanding, and that in addition to closer cooperation and more frank discussion of present and future problems, there are certain specific concessions which the United should make both for the sake of equity and for

the purpose of eliminating conditions which cause misunderstanding and dissatisfaction.

Specifically, we ask on behalf of the National Shoe Manufacturers Association and its members who produce the bulk of the footwear manufactured in the United States, that the United Shoe Machinery Corporation adopt the following policies and procedure:

1. That the United discuss with a representative committee of the industry the reasons for the increase of July 31 and that these discussions be supported by factual data instead of statements of generalities. It is further proposed that a similar procedure be followed in case of any increases or important policy changes contemplated in the future.

2. The Committee urges that consultation be held between the United and industry representatives with a view to selecting certain machines now offered on a lease basis only and establishing such machines on a basis of optional lease or outright purchase.

3. The Committee requests that similar discussions be held with a view to establishing cut-off points on certain machines after which the machines would become the property of the manufacturer and no further rentals or unit charges would be paid.

4. It is requested that the philosophy as expressed in the report by Mr. Leinau quoted above be ex-

plained and that similar consultations as the ones requested above be held where rates on newly developed machines are being established, and that the thinking expressed in Paragraph 6 of the Report of the Committee, dated July 7, be adopted as the prevailing sentiment of such discussions.

5. The Committee requests that the United cooperate with Association in a study of deferred license fees with a view to revising the right of deduction percentage to the end that the average period of time required for eliminating liability will be not more than ten years and that in no case where a machine is in regular use shall the right of deduction fund accumulation fail to eliminate liability in 20 years.

6. It is also requested that the United institute a study in a few typical factories for the purpose of determining the extent to which machine part costs have increased since 1945, with a view to discovering the reasons for any increase in the number of machine parts being used. After this study has been completed it is requested that the Committee be given the detailed results.

It is the sincere hope of the Committee that the amicable relations which have existed between it and the United can be preserved and that the highly constructive work which was begun can be continued and accelerated.

It should be pointed out, however, that judging by the reactions of shoe manufacturers all over the United States as expressed to the Association the increases announced

by United on July 31 exploded as a bomb shell in the industry and the problems and recommendations outlined above should and must be dealt with if the effective work of the Committee is to continue in a proper atmosphere of cooperation and mutual help.

CHARLES H. JONES, JR.
ALLEN CADWELL
B. A. GRAY
CHARLES F. JOHNSON, JR.
WARREN REARDON
L. B. SHEPPARD
S. L. SLOSBERG
WEIR STEWART
W. W. STEPHENSON

**Plaintiff's Exhibit 25 (Part)**

* * * * *

The statement of the Committee concludes with listing six specific concessions which we are requested to consider, and I would like to deal briefly with them in order,—

1. It is proposed that we should furnish factual data to justify the increases in our unit charges and that we should do so whenever changes in our price schedules are made in the future. As to this, I have already pointed out that the question of the reasonableness of our lease terms is one of the important issues raised by the government in our anti-trust suit, and is one which we will have to meet in court in due time. I am sure you will understand, therefore, that our lawyers would object to our attempting to comply with your request at this time, even if we felt it would otherwise be proper for us to do so.

2. The suggestion is that we consult in regard to offering additional machines on optional lease or outright purchase basis. As the Committee must know, our whole leasing system is under attack by the government in the anti-trust suit. Consequently, we do not feel that it would be proper for us to discuss or consider any change which would affect our leases or leasing policies until the Court has handed down its decision.

3. It is proposed that after a certain period of time certain machines out on lease would become the property of the lessee. The comment I have

made under No. 2 applies equally to this, but I cannot help but point out that this is merely a proposal that we should discontinue putting out machines on lease and henceforth they should be offered on an installment sale basis, for this is what the proposal really amounts to. In other words, it would appear from this that the Committee is anxious to do away with a leasing system which has been generally recognized as having been highly beneficial to the shoe industry for more than 75 years. I cannot believe that the industry as a whole would go along with any such proposal.

4. I have already pointed out that no such philosophy as has been erroneously attributed to the report by Mr. Lienau has ever been adopted by the Corporation.

5. It is proposed that a study should be made of deferred license fees. Here again, this is a matter having a direct bearing on our leases and leasing policies, and is a subject which we do not feel we can properly discuss at this time on account of the suit.

6. It is suggested that the cost of replacement parts be studied in certain factories. It is not quite clear why such studies are necessary or warranted. However, certain studies have already been made with results which I believe have already been indicated to the Committee. We rather question whether any useful purpose would be served by such further studies.

*Plaintiff's Exhibit 25 (Part)*

In conclusion I want to repeat that it is our earnest desire to cooperate to the fullest extent with your Committee in regard to any and all matters where we can properly do so.

**Plaintiff's Exhibit 26**

(See Opposite) ☞

THE HANOVER SHOE, INC.

Machinery Purchased from United Shoe Machinery Corp.

1955

| Type of Machine | Model | No. of Machines | Cost |
|---|---|---|---|
| Goodyear Outsole Rapid Lockstitch Machine | O | 17 | $ 30,974.00 |
| USMC Staple Side Lasting Machine | B | 15 | 55,707.38 |
| USMC Heel Seat Lasting Machine | E | 4 | 53,675.80 |
| USMC Toe Lasting Machine | C | 14 | 83,403.00 |
| Odyr. Welt Butting & Trimming Machine | B | 2 | 16,806.40 |
| McKay Automatic Heel Loading & Attaching Machine | B | 7 | 14,898.87 |
| Odyr. Inseaming Machine | B | 10 | 100,180.00 |
| Odyr. Universal Rounding & Channeling Machine | E | 9 | 17,305.50 |
| Ideal Clicking Machine | C | 12 | 5,036.10 |
| Automatic Heel Compressing Machine | 6 | 2 | 11,504.87 |
| Rex Assembling Machine | K | 8 | 23,805.27 |
| USMC Fibre Fastening Machine | B | 3 | 9,988.75 |
| USMC Lasting Machine | A | 5 | 13,997.00 |
| Insole Rib Reinforcing Machine | B | 4 | 11,230.92 |
| USMC Upper Trimming Machine | J | 2 | 843.26 |
| Loose Nailing Machine | 2 | 2 | 4,004.25 |
| Odyr. Stitch Separating Machine | B | 7 | 5,334.60 |
| Odyr. Welt Indenting Machine | C | 1 | 993.50 |
| Odyr. Rapid Bobbin Winding Machine | - | 2 | 249.74 |
| Odyr. Upper Stapling Machine | B | 2 | 1,887.94 |
| Odyr. Welt Indenting & Burnishing Machine | - | 2 | 232.51 |
| Odyr. Welt Beating & Slugging | - | 3 | 2,383.98 |
| USMC Skiving Machine | A | 1 | 239.64 |
| USMC Eyeletting Machine | C | 12 | 8,883.10 |
| USMC Edge Trimming Machine | K | 10 | 1,429.50 |
| USMC Rubbering Machine | G | 1 | 947.78 |
| | | 157 | 475,963.66 |

Machinery Purchased from United Shoe Machinery Corp.

1955

| Type of Machine | Model | No. of Machines | Cost |
|---|---|---|---|
| Brought Forward from page 1 | | 157 | $ 475,943.66 |
| USMC Tip Finishing Machine | A | 2 | 8,549.44 |
| USMC Splitting Machine | G | 2 | 633.12 |
| USMC Lasting Machine | 7 | 2 | 1,244.00 |
| USMC Insole Tacking Machine | 1 | 4 | 1,229.61 |
| Power Welt Tacking Machine | - | 2 | 811.42 |
| USMC Sole Cementing Machine | C | 3 | 704.54 |
| USMC Inseam Cementing Machine | A | 3 | 821.99 |
| USMC Cementing Machine | C | 3 | 582.66 |
| USMC Thermo-Cementing & Folding | A | 2 | 2,450.00 |
| Insole Rib Cementing Machine | A | 2 | 869.08 |
| Rosenow Insole Lip Cementing | C | 2 | 373.91 |
| Duplex eyeletting Machine | B | 4 | 4,035.69 |
| Ideal Twin Clicking Machine | G | 3 | 9,549.23 |
| Crest Heel Blacking Machine | C | 4 | 1,567.84 |
| Improved Gearless Sole Cutting | H | 1 | 764.10 |
| Universal Slugging Machine | - | 2 | 1,956.26 |
| Jointing Machine | G | 1 | 91.56 |
| Planet Sole Rounding Machine | K | 1 | 947.96 |
| Rosenow Insole Lip Setting Machine | B | 3 | 740.62 |
| Heel Breast Scouring & Aligning | A | 1 | 674.21 |
| | | 206 | $ 513,940.50 |

THE HANOVER SHOE, INC.

Machinery Purchased from United Shoe Machinery Corp.

1956

| Type of Machine | Model | No. of Machines | Cost |
|---|---|---|---|
| Rem Pulling Over Machine | C | 13 | $ 66,654.35 |
| Gdyr. Automatic Sole Leveling Machine | D | 4 | 16,121.16 |
| USMC Skiving Machine | A | 22 | 7,854.65 |
| USMC Edge Trimming Machine | L | 9 | 3,037.92 |
| USMC Edging Machine | B | 2 | 1,831.20 |
| Rapid Folding Machine | J | 7 | 4,155.97 |
| Insole Lip Cutting & Seoring Machine | E | 1 | 243.75 |
| | | 58 | $ 99,899.00 |

**Plaintiff's Exhibit 31**

(See Opposite) ☞

31 (7/19/6

[illegible] INC.

Rentals Paid to United Shoe Machinery Corporation On Optional Machines Compared to Total Rental and Royalties
January 1, 1940 to December 31, 1954

| Year | Rentals and Royalties Paid on Lease Only Machines as per Defendant's Answers to Interrogatories | Total Rentals Paid on Optional Machines as per Plaintiff's Books | Total Rentals & Royalties Paid | % Represented by Optional Machine Rentals |
|---|---|---|---|---|
| 1940 | 88,667.20 | 1,773.50 | 90,440.70 | 1.96 |
| 1941 | 135,612.32 | 2,076.75 | 137,689.07 | 1.51 |
| 1942 | 154,397.91 | 2,276.33 | 156,674.24 | 1.45 |
| 1943 | 151,094.89 | 2,322.50 | 153,417.39 | 1.51 |
| 1944 | 147,683.85 | 2,532.18 | 150,216.03 | 1.69 |
| 1945 | 142,241.66 | 3,003.00 | 145,244.66 | 2.07 |
| 1946 | 139,289.32 | 3,116.16 | 142,405.48 | 2.19 |
| 1947 | 145,460.01 | 3,775.34 | 149,235.35 | 2.53 |
| 1948 | 153,840.80 | 5,635.06 | 159,475.86 | 3.53 |
| 1949 | 164,892.06 | 6,762.50 | 171,654.56 | 3.94 |
| 1950 | 175,656.79 | 6,835.83 | 182,492.62 | 3.75 |
| 1951 | 208,735.41 | 6,921.66 | 215,657.07 | 3.21 |
| 1952 | 192,552.75 | 6,257.29 | 198,810.04 | 3.15 |
| 1953 | 182,882.75 | 5,674.13 | 188,556.88 | 3.01 |
| 1954 | 170,021.06 | 5,740.50 | 175,761.56 | 3.27 |
| | 2,353,028.78 | 64,702.73 | 2,417,731.51 | 2.68 |

**Plaintiff's Exhibit 33**

(See Opposite) ☞

P-33 (9/19/62)

THE HANOVER SHOE, INC.

Summary of Royalties and Rentals - Paid to U. S. M. C. and Other Shoe Machinery Manufacturers for Shoe Machinery For the Period July 1, 1939 to September 30, 1955

| Year | U. S. M. C. | John E. Mitchell | Lacone Mfg. Co. | The Louis O. Freeman Co. | B. B. Chemical Co. | Total of All Others (1) | Annual Totals |
|---|---|---|---|---|---|---|---|
| 1939 (last 6 mos.) | 40,433.65 | 340.90 | 544.24 | 201.00 | — | 84.00 | 41,603.79 |
| 1940 | 88,667.20 | 403.70 | 1,256.79 | 458.00 | — | 319.68 | 91,105.37 |
| 1941 | 135,612.32 | 493.00 | 1,861.55 | 698.00 | — | 471.36 | 139,136.23 |
| 1942 | 154,397.91 | 894.45 | 2,520.89 | 714.00 | — | 83.14 | 158,610.39 |
| 1943 | 151,094.89 | 724.80 | 2,803.81 | 728.00 | — | 160.00 | 155,503.50 |
| 1944 | 147,683.85 | 701.10 | 2,747.41 | 700.40 | — | 58.00 | 151,890.76 |
| 1945 | 142,241.66 | 440.40 | 2,310.13 | 864.00 | — | 38.00 | 145,894.19 |
| 1946 | 139,289.32 | 440.40 | 2,756.37 | 1,065.00 | — | 51.50 | 143,602.59 |
| 1947 | 145,460.02 | 440.40 | 2,383.58 | 1,713.50 | 57.31 | 92.00 | 150,646.80 |
| 1948 | 153,840.80 | 635.20 | 2,907.19 | 1,945.50 | 2,553.24 | 315.00 | 162,196.93 |
| 1949 | 164,892.06 | 535.20 | 2,711.49 | 2,688.75 | 3,859.74 | 547.00 | 175,234.24 |
| 1950 | 175,656.79 | 535.20 | 2,569.66 | 1,346.50 | 4,110.98 | 1,923.95 | 186,143.08 |
| 1951 | 208,735.41 | 535.20 | 3,149.45 | 945.50 | 4,415.76 | 1,760.45 | 219,541.77 |
| 1952 | 192,552.75 | 472.00 | 2,583.72 | 906.00 | 3,979.20 | 1,015.00 | 204,508.67 |
| 1953 | 182,882.75 | 465.90 | 2,244.16 | 676.00 | 3,570.38 | 950.00 | 190,789.19 |
| 1954 | 170,021.06 | 542.40 | 1,801.13 | — | 3,204.49 | 458.34 | 176,027.42 |
| 1955 (9 mos. for all except USMC which includes charges thru 9/21/55) | 111,546.79 | 406.80 | 1,817.11 | — | 2,719.96 | 137.50 | 116,630.16 |
| | 2,505,011.22 | 9,007.05 | 39,468.68 | 15,642.15 | 28,471.06 | 8,464.92 | 2,606,065.08 |

Note 1. The companies involved under the caption "Total of All Others" are: Krippendorf Kalculator Co., North American Chemical Co., Tubular Rivet & Stud Co., Atlas Tack Co., Judson L. Thompson Mfg. Co., Compo Shoe Mach. Corp., Dexter Folder Co., International Shoe Mach. Corp., Lowell Counter Co., Prime Mfg. Co., Hanover Construction Co.

**Plaintiff's Exhibit 34**

(See Opposite) ☞

34

1/19/8-)

THE HANOVER SHOE, INC.

Analysis of Machinery Purchases

July 1, 1939 to September 21, 1955

| Year | PURCHASES FROM United Shoe Mach. Corp. | Other Than U.S.M.C. | Freight, etc. | Total |
|---|---|---|---|---|
| 1939 (From 7/1/39) | $ — | $ 100.00 | $ — | $ 100.00 |
| 1940 | 1,539.92 | 9,093.49 | 388.61 | 10,962.02 |
| 1941 | 679.50 | 10,022.62 | 336.16 | 11,038.28 |
| 1942 | 102.00 | 20,375.28 | 558.34 | 21,035.62 |
| 1943 | — | 2,950.00 | 21.13 | 2,971.13 |
| 1944 | 32.00 | 2,935.09 | 26.57 | 2,993.66 |
| 1945 | 173.00 | 9,230.86 | 44.94 | 9,448.80 |
| 1946 | 45.72 | 37,229.27 | 219.56 | 37,494.55 |
| 1947 | 580.34 | 74,727.33 | 721.59 | 76,029.26 |
| 1948 | 2,196.97 | 60,916.63 | 345.54 | 63,459.14 |
| 1949 | 1,258.44 | 23,476.42 | 50.33 | 24,785.19 |
| 1950 | 1,337.57 | 3,004.07 | 125.99 | 4,467.63 |
| 1951 | 164.58 | 62,737.14 | 1,355.96 | 64,257.68 |
| 1952 | 5,908.42 | 27,501.75 | 221.29 | 33,631.46 |
| 1953 | 5,505.61 | 41,982.11 | 1,046.23 | 48,534.15 |
| 1954 | 846.26 | 9,987.10 | 354.29 | 11,187.65 |
| 9/30/55 | 9,245.75 | 12,226.64 | 185.56 | 21,657.95 |
| | $ 29,616.28 | $ 408,495.80 | $ 5,942.09 | $ 444,054.77 |

Sewing machs 73,279.09 (p. 457)

335,216.71

**Defendant's Exhibit 5**

(See Opposite) ☞

Memorandum for: Davis Polk Wardwell Sunderland & Kiendl

Defendant's Exhibit 5

MACHINES SHIPPED SINCE 1922 WHICH HAD OPTIONAL TERMS TAKEN ON LEASE BASIS, PRIOR TO JANUARY 1, 1955

| Name of Machine | HANOVER, PA. No. | Date Shipped | Disposition |
|---|---|---|---|
| Heel-Breast Aligning "A" | 189 | 5. 8.34 | 7.23.34 Ret. |
| Great Heel Blacking "G" | 96 | 8.28.28 | 3.30.53 Ret. |
| | 97 | 8.28.28 | 6.30.53 Ret. |
| | 156 | 3.12.29 | 6.30.53 Ret. |
| | 157 | 3.12.29 | 6.30.53 Ret. |
| | 691 | 6. 3.53 | 8.31.55 Sold |
| | 692 | 6. 3.53 | 8.31.55 Sold |
| | 693 | 6. 3.53 | 8.31.55 Sold |
| | 679 | 6. 5.53 | 8.31.55 Sold |
| USMC Channel Cementing "A" | 341 | 10. 1.43 Tr. | 9. 1.44 Tr. |
| USMC Inseam Cementing "A" | 261 | 6.20.44 | 8.31.55 Sold |
| | 268 | 9.27.44 | 9.27.54 Ret. |
| | 350 | 1. 5.49 | 8.31.55 Sold |
| | 267 | 9.27.44 | 8.31.55 Sold |
| | 43 | 12.15.32 | 3.27.33 Ret. |
| USMC Sole Cementing "G" | 112 | 6.15.34 | 9.11.34 Ret. |
| | 42 | 6.15.34 | 8.31.55 Sold |
| | 165 | 12.11.43 | 7.22.52 Ret. |
| | 113 | 12. 5.44 | 8.31.55 Sold |
| | 108 | 10. 6.44 | 10.21.52 Ret. |
| Insole Lip Cutting & Seoring "E" | 153 | 6.11.48 | 8.31.55 Sold |
| Insole Tack Cutting "A" | 292 | 10. 8.41 | 5.31.55 Sold |
| USMC Embossing "G" | 212 | 1. 8.52 | 3.14.52 Ret. |
| USMC Embossing "E" | 68 | 10. 7.47 | 8.31.55 Sold |
| USMC Sole Edge Inking "A" | 65 | 7. 3.36 | 10. 8.36 Ret. |
| | 248 | 9.12.50 | 1.11.51 Ret. |
| Nurling "A" | 310 | 9.22.50 | 1.11.51 Ret. |
| USMC Pasting "E" | 18 | 5. 3.26 | 9.12.34 Ret. |
| | 2573 | 5. 1.34 | 9.11.52 Ret. |
| | 2574 | 5. 1.34 | 9.11.52 Ret. |
| | 2596 | 5.23.34 | 9.11.52 Ret. |
| | 2597 | 5.23.34 | 9.11.52 Ret. |
| | 2598 | 5.23.34 | 9.11.52 Ret. |
| | 2599 | 5.23.34 | 9.11.52 Ret. |
| | 2600 | 5.23.34 | 9.11.52 Ret. |
| | 2593 | 6.15.34 | 9.11.52 Ret. |
| USMC Last Pulling "E" | 3308 | 11. 7.40 | 9.11.52 Ret. |
| | 675 | 8.21.41 | 10. 1.47 Tr. |
| | 683 | 11. 7.41 | 9.15.47 Tr. |
| | 690 | 11. 7.41 | 9.15.47 Tr. |
| | 912 | 6.20.51 | 10. 9.51 Ret. |
| | 255 | 5.13.32 | 8. 8.32 Ret. |
| | 464 | 1.17.35 | 5.29.35 Ret. |
| Rotary Feather Edge & Shank Reducing "B" | 76 | 7.27.26 | 6.21.40 Ret. |
| USMC Shank Reducing "A" | 53 | 8.12.26 | 9.12.49 Ret. |
| | 439 | 10. 3.40 | 12. 6.50 Ret. |
| USMC Heel Securing "A" | 7 | 6.30.50 | 2.13.51 Ret. |
| USMC Twin Edge Setting "D" | 605 | 6.11.34 | 7. 9.52 Ret. |
| | 606 | 6.11.34 | 6.17.55 Ret. |
| | 607 | 6.11.34 | 6.17.55 Ret. |
| | 629 | 8.16.34 | 6.17.55 Ret. |
| | 630 | 8.16.34 | 6.17.55 Ret. |
| | 631 | 8.16.34 | 6.17.55 Ret. |
| | 33 | 11. 1.26 | 11.26.51 Ret. |
| | 252 | 4.12.29 | 10.26.51 Ret. |

THE HANOVER SHOE, INC. HANOVER, PA.

| Name of Machine | No. | Date Shipped | Disposition |
|---|---|---|---|
| •USMC Twin Edge Setting "F" | 2 | 8. 5.48 | 6.17.55 Ret. |
| | 305 | 10.30.50 | 12. 4.50 Ret. |
| | 311 | 11. 9.50 | 11.22.50 Ret. |
| | 312 | 11. 9.50 | 11.22.50 Ret. |
| | 556 | 2.10.53 | 2.10.53 Sold |
| •Apex Tap Skiving or Rand Splitting "C" | 1512 | 10.11.49 | 11. 3.49 Sold |
| •Regent Stamping "C" | 555 | 10. 1.26 | 7. 5.40 Ret. |
| | 1808 | 5.16.40 | 6. 3.40 Sold |
| •Shank Piece Sticking "E" | 569 | 1.18.49 | 7.22.52 Ret. |
| •USMC Edge Trimming "H" | 437 | 6.19.34 | 8.31.55 Sold |
| | 438 | 6.19.34 | 8.31.55 Sold |
| | 439 | 6.19.34 | 8.31.55 Sold |
| | 440 | 6.19.34 | 8.31.55 Sold |
| | 441 | 6.19.34 | 8.31.55 Sold |
| | 442 | 6.19.34 | 8.31.55 Sold |
| | 443 | 6.19.34 | 8.31.55 Sold |
| | 444 | 6.19.34 | 8.31.55 Sold |
| | 445 | 6.19.34 | 8.31.55 Sold |
| | 446 | 6.19.34 | 8.31.55 Sold |
| •USMC Edge Trimming "L" | 911 | 6.17.44 | 7.24.54 Ret. |
| | 273 | 7.27.42 | 7.27.56 Sold |
| | 72 | 3.20.41 | 5.21.56 Sold |
| | 287 | 7.29.44 | 9. 9.55 Ret. |
| | 291 | 7.29.44 | Form B Lease |
| | 686 Tm | 2.16.48 | 5.31.56 Sold |
| | 755 Tm | 2.16.48 | 8. 9.55 Ret. |
| | 866 | 4.16.48 | 5.31.56 Sold |
| | 867 | 4.16.48 | 5.31.56 Sold |
| | 854 | 6.23.48 | 6.30.56 Sold |
| | 946 | 6.30.48 | 6.30.56 Sold |
| | 947 | 6.30.48 | 6.30.56 Sold |
| | 1100 | 9.14.49 | Form A Lease |
| •USMC Cementing "C" | 1791 | 11. 6.44 | 1. 3.45 Sold |
| | 2002 | 10. 4.46 | 11. 8.49 Ret. |
| •USMC Cementing "F" | 2078 | 11.27.46 | 11. 8.49 Ret. |
| •USMC Upper Cementing "A" | 18 | 12.18.50 | 2. 8.51 Ret. |
| •Rapid Folding "H" | 889 | 3.14.27 | 4.20.27 Sold |
| | 217 | 3.14.27 | 4.20.27 Sold |
| | 3423 | 5.27.41 | 8.21.41 Sold |
| | 3514 | 1. 9.45 | 5. 1.53 Ret. |
| | 3516 | 1. 9.45 | 5. 1.53 Ret. |
| | 3749 | 1.15.47 | 5. 1.53 Ret. |
| | 3517 | 1. 9.45 | 8. 1.49 Tr. |
| | 3518 | 1. 9.45 | 11. 1.49 Tr. |
| | 3714 | 11.18.46 | 5. 1.53 Ret. |
| | 3811 | 3. 6.47 | 5. 1.53 Ret. |
| | 3845 | 4.30.47 | 5. 1.53 Ret. |
| | 3860 Tm | 8. 1.47 | 5. 2.49 Tr. |
| | 3970 | 9.12.47 | 5. 1.53 Ret. |
| | 3971 | 9.25.47 | 5. 1.53 Ret. |
| | 4005 | 10.28.47 | 11. 1.49 Tr. |
| •Rapid Folding "J" | 3749 | 1.15.47 | 5. 1.53 Ret. |
| | 1121 | 9.15.52 | 5.31.56 Sold |
| | 1235 | 3.25.53 | 5.31.56 Sold |
| | 1236 | 3.25.53 | 5.31.56 Sold |
| | 1237 | 3.25.53 | 5.31.56 Sold |
| | 1238 | 3.25.53 | 5.31.56 Sold |
| •New Power Hammer "C" | 500 | 7. 5.32 | 11. 7.32 Ret. |
| •USMC Perforating "A" | 314 | 6. 1.32 c/from Sale 11.30.32 | 6. 2.36 Ret. |

## THE HANOVER SHOE, INC. HANOVER, PA.

| Name of Machine | No. | Date Shipped | Disposition |
|---|---|---|---|
| USMC Seam Reducing "A" | 21 | 5.27.54 | 11. 2.54 Ret. |
| USMC Upper Reinforcing "A" | 6 | 10. 9.50 | 4.27.51 Ret. |
| USMC Seam Rubbing "C" | 39 | 5.16.40 | 8. 6.40 Ret. |
| Pique Skiving "H" | 950 | 5. 7.46 | 10. 8.54 Ret. |
| | 1045 | 11.15.46 | 4.18.55 Ret. |
| | 1076 | 1.31.47 | 10.17.52 Ret. |
| USMC Skiving "A" | 441 | 9. 7.33 | 1.24.50 Ret. |
| | 444 | 9.13.33 | 5.31.56 Sold |
| | 442 | 9.13.33 | 12. 6.50 Sold |
| | 1582 | 9.20.40 | 11.10.55 Sold |
| | 1513 | 11.26.40 | 1.12.56 Sold |
| | 1598 | 2. 7.41 | 4. 7.56 Sold |
| | 1602 | 2.25.41 | 4.25.56 Sold |
| | 1936 | 6. 4.46 | 6. 4.56 Sold |
| | 1946 | 6.12.46 | 6.12.56 Sold |
| | 2595 | 4.26.48 | 5.31.56 Sold |
| | 2278 | 10. 8.47 | 5.31.56 Sold |
| | 2300 | 8. 2.48 | 5.31.56 Sold |
| | 2818 | 8.18.50 | 5.31.56 Sold |
| | 2880 | 1. 2.51 | 5.31.56 Sold |
| | 3140 | 9.23.53 | Form A Lease |
| | 2194 | 6.25.47 | 5.31.56 Sold |
| | 2201 | 7.30.47 | 5.31.56 Sold |
| | 2273 | 10. 8.47 | 5.31.56 Sold |
| | 2277 | 10. 8.47 | 5.31.56 Sold |
| USMC Thermo-Cementing & Folding "A" | 1020 | 12.13.54 | 8.31.55 Sold |
| "B" | 1051 | 12.27.54 | 8.31.55 Sold |
| | 21 | 3.16.54 | 6.15.54 Tr. |

## EMMITSBURG, MARYLAND

| | | | |
|---|---|---|---|
| Crest Heel Blacking "C" | 485 | Tr. 8. 2.48 | 10.27.49 Ret. |
| USMC Channel Cementing "A" | 947 | Tr. 8. 2.48 | 7. 8.52 Ret. |
| USMC Sole Cementing "C" | 78 | Tr. 8. 2.48 | 7. 8.52 Ret. |
| Improved Gearless Sole Cutting "H" | 7821 | 9.24.48 | 8.31.55 Sold |
| Insole Lip Cutting & Scoring "D" | 1216 | 10.31.50 | 4.27.51 Ret. |
| "E" | 415 | 4. 6.51 | 2. 1.52 Ret. |
| USMC Embossing "G" | 40 | Tr. 8. 2.48 | 2.14.49 Ret. |
| | 77 | 6. 6.49 | 7. 9.52 Ret. |
| USMC Pasting "E" | 2681 | Tr. 7. 1.49 | 7. 8.52 Ret. |
| | 3681 | Tr. 7. 1.49 | 7. 8.52 Ret. |
| Heel Breast Scouring "H" | 704 | Tr. 8. 2.48 | 7. 8.52 Ret. |
| Heel Scouring "R" | 4353 | Tr. 8. 2.48 | 7. 8.52 Ret. |
| | 4859 | Tr. 8. 2.48 | 7. 8.52 Ret. |
| | 4880 | Tr. 8. 2.48 | 7. 8.52 Ret. |
| Regent Stamping "C" | 1639 | Tr. 8.16.48 | 7. 9.52 Ret. |
| Shank Piece Sticking "B" | 540 | Tr. 8. 2.48 | 7. 9.52 Ret. |
| USMC Edge Trimming "H" | 1155 | Tr. 8. 2.48 | 7. 8.52 Ret. |
| | 1156 | Tr. 8. 2.48 | 12.30.54 Ret. |
| | 1157 | Tr. 8. 2.48 | 7. 8.52 Ret. |
| | 1158 | Tr. 8. 2.48 | 7. 8.52 Ret. |
| USMC Cementing "C" | 1702 | Tr. 8. 2.48 | 1.24.50 Ret. |
| Rapid Folding "H" | 2950 | Tr. 7.15.48 | 6.30.53 Ret. |
| | 3236 | Tr. 8. 2.48 | 5. 1.53 Ret. |
| USMC Skiving "A" | 775 | Tr. 8. 2.48 | 1.24.50 Ret. |
| | 2216 | Tr. 8. 2.48 | 5.31.56 Sold |
| | 2300 | Tr. 8. 2.48 | 5.31.56 Sold |
| USMC Splitting "A" | 866 | Tr. 8. 2.48 | 6.15.49 Ret. |

THE HANOVER SHOE, INC. MIDDLETOWN, PA.

| Name of Machine | No. | | Date Shipped | Disposition |
|---|---|---|---|---|
| USMC Cementing "C" | 2174 | | 3.25.47 | 8.31.55 Sold |
| | 2100 | Tr. | 4.15.47 | 8.31.55 Sold |
| | 2105 | Tr. | 4.15.47 | 8.31.55 Sold |
| Rapid Folding "H" | 3965 | | 8.26.47 | 6. 1.49 Tr. |
| | 3966 | | 8.26.47 | 5. 1.53 Ret. |
| | 3993 | | 10.17.47 | 5. 1.53 Ret. |
| Rapid Folding "J" | 1120 | | 9.15.52 | 5.31.56 Sold |
| | 1234 | | 3.25.53 | 5.31.56 Sold |
| Pluma Skiving "O" | 51 | | 10.16.47 | 4.18.55 Ret. |
| | 71 | | 11. 5.47 | 9. 9.55 Ret. |
| | 106 | | 10. 7.47 | 8. 9.55 Ret. |
| USMC Skiving "A" | 2327 | | 12.17.47 | 5.31.56 Sold |
| | 2328 | | 12.17.47 | 5.31.56 Sold |
| | 2342 | | 2. 2.48 | 5.31.56 Sold |
| | 2587 | | 4. 1.48 | 5.31.56 Sold |
| | 2368 | | 6.28.48 | 5.31.56 Sold |

**Defendant's Exhibit 7**

(See Opposite) ☞

# UNITED SHOE MACHINERY CORPORATION

BRANCH OFFICE

20 SO. 4TH STREET

CLARENCE E. ROEDER. DISTRICT MANAGER

HARRISBURG, PA.
Hanover, Pa.
August 3, 1950

Hanover Shoe Inc.
Hanover, Penna.

Attention - Mr. R. McDonald
General Superintendent

Dear Sir:

Please sign the attached Forms 3222 covering the eight (8) Goodyear Welt Sewing Machines, Model K, #'s 39,795, 1273, 1274, 1709, 1710, 1879, 3026, and USMC Twin Edge Setting Machines Model D, #'s 33, 252, 605, 606, and 607 to be returned to Beverly, Mass. due to same being replaced with new model Machines.

Please keep one copy for your files, forwarding the remaining two (2) copies to this office. Thank you.

Yours truly,
UNITED SHOE MACHINERY CORP.
HANOVER SUB OFFICE

C. T. Lehn

CTL/dgb

Defendant's Exhibit 7

**Defendant's Exhibit 8**

(See Opposite) ☞

# UNITED SHOE MACHINERY CORPORATION

BRANCH OFFICE
20 SO. 4TH STREET

C. M. SCHMITZ, DISTRICT MANAGER

~~HARRISBURG, PA.~~
anover, Pa.
arch 27, 1952

anover Shoe Inc.
anover, Penna.

Attention - Mr. R. Purtell
eneral Superintendent

Dear Sir:

We are attachin: Request for Return Forms (P3222) covering the return of 6 Pulling Over Machines, Model C, #'s 3524, 3292, 3525, 3526, 3295, 3296.

These machines will be replaced with new machines now on order with us.

We ask that you execute these papers and return three of same to this office, keeping the fourth copy for your files.

Yours truly,
UNITED SHOE MACHINERY CORP.
ANOVER SUB OFFICE

C. M. Schmitz

ctl/dmb
Enc.

Defendant's Exhibit 8

**Defendant's Exhibit 9**

(See Opposite) ☞

UNITED SHOE MACHINERY CORPORATION

BRANCH OFFICE
20 SO. 4TH ST., HARRISBURG, PA.

C. H. SCHMITZ, District Manager

Hanover, Pa.
December 8, 1952

Hanover Shoe Inc.
Hanover, Pa.

Attention - Mr. R. F. Purtell
General Superintendent

Dear Sir:

Per our telephone conversation of this morning, we are attaching an order and leases for a new Goodyear Welt Butting & Tacking Machine, Model B which is to replace your old Welt Butter #291.

We are also attaching our Request for Return Forms (F3222) covering the return of machine #291.

Confirming Mr. P. H. Randall's conversation with you Friday, December 5, 1952, we wish to advise our Boston Office will waive payment of the head WBT 454 plus which is broken on your old Model Machine. We ask that the executed forms be returned to this office at your earliest convenience.

Yours truly,
UNITED SHOE MACHINERY CORP.
HANOVER SUB OFFICE

C. T. Lehn

CTL/dgb
Enc.

Defendant's Exhibit 9

**Defendant's Exhibit 10**

(See Opposite) ☞

Defendant's Exhibit 10

March , 1953 19

United Shoe Machinery Corporation
~~20 South Fourth St.~~
~~Harrisburg, Penna.~~

Gentlemen:

We are considering the surrender of the following leased machines for the reasons noted:

| Machine & Model | No. | Reasons | Motor Drive |
|---|---|---|---|
| ~~Automatic Heel Compressing Machine Model 60~~ | 119 | Replacement for new machines | No |

If the machines are surrendered at this time, will you accept them and terminate leases under which they are held?,
We do
We do not desire to have all rights of deduction to which we are entitled applied to deferred payments.

HANOVER SHOE INC.
[signature]

P 3222 REV-2

**Defendant's Exhibit 11**

(See Opposite) ☞

Defendant's Exhibit 11

April 27, 1953

Mr. C. T. Lehn
United Shoe Machinery Corporation
131 Centennial Avenue
Hanover, Pennsylvania

Dear Sir:

Wish to advise you that this date we are returning to Beverly the Rapid Folding machines, Model H, both from Hanover and Middletown which are now surplus to our requirements as they have been replaced by the Model J Folders.

We are not returning from Middletown machine #2950 as this machine will be held until we have repaired our company owned machine to be used as a spare at Middletown.

We are, therefore, returning from Middletown the following four machines; all model H: 3236, 3811, 3845, and 3966. We note that the transmitter wheel has been chipped on machine 3236, however, there will be transmitters returned with all of the above mentioned machines.

From Hanover we will return the following machines, all Model H: 3514, 3970, 3714, 3971, 3749, 3516, 3993. These machines all will be returned complete with transmitters.

We are also returning from Hanover the five transmitters that were received with our new Model J machines as we have these machines set up on individual motor drive, therefore, we would like to have a return memorandum made from United giving us credit for the return of the transmitters for Model J Folders 1235, 1236, 1237, 1238 and 1121.

Looking forward to your early reply we are,

Very truly yours,

THE HANOVER SHOE, INC.

RFP/cmf

R. F. Partell

**Defendant's Exhibit 12**

(See Opposite) ☞

UNITED SHOE MACHINERY CORPORATION

BRANCH OFFICE
20 SO. 4TH STREET

C. M. SCHMITZ, DISTRICT MANAGER

Hanover, Pa.
June 17, 1953

Hanover Shoe Inc.
Hanover, Penna.

Attention - Mr. R. F. Purtell
General Superintendent

Dear Sir:

We are herewith attaching orders and leases covering eight (8) Rex Assembling Machines, Model H which you desire to have placed in your factory as replacements for 8 old machines.

We ask that you execute these papers and return same to this office at your first convenience.

Yours truly,
UNITED SHOE MACHINERY CORPORATION
HANOVER SUB OFFICE

C. T. Lehn

CTL/dgb
Enc.

Defendant's Exhibit 12

**Defendant's Exhibit 13**

(See Opposite) ☞

Defendant's Exhibit 13

March 28, 1955

Mr. C. T. Lehn
United Shoe Machinery Corporation
931 Centennial Avenue
Hanover, Pennsylvania

Dear Sir:

Attached please find the Request for Return Forms to cover one Pluma Skiving Machine, Model O #51 located in our Hanover fitting room and one Pluma Skiving Machine, Model N #1045 located in our Middletown plant.

As we have explained both of these machines will be surplus to our requirements as they are going to be replaced with other machines.

Yours very truly,

THE HANOVER SHOE, INC.

R. F. Purcell

RFP/efm

CC - Mr. George Kelbe
Mr. Paul Arthur
Mr. Bill Leitner
Mr. Keith Kellar

P.S. These are the machines that will be replaced by the two new SAB Skivers. As soon as we receive word from Manufacturers Supplies relative to the three step skiver we will request the return of two model A's to United Shoe.

As soon as these two machines are set up, that is the SAB, make sure that we return the United machines immediately.

APPENDIX D

**Defendant's Exhibit 14**

(See Opposite) ☞

Defendant's Exhibit 14

June 9, 1953

Mr. C. T. Lehn
United Shoe Machinery Corporation
131 Centennial Avenue
Hanover, Pennsylvania

Dear Sir:

In reply to your letter of June 3rd regarding the results of your examination of our Rex Assembling Machines, Model R we would like to talk to you further regarding the following. The machines which we have in the 1500 series machines 1550, 1595, 1597, 1598, 1539, 1596 were all received in Hanover during the year 1926 and we do feel that we should therefore ask for a replacement on these six assembling machines.

At the same time we would like to consider the advisability of also returning machines 4253, 4619 and 3893 as these machines are quite old even though received in 1937 and 1940 and the only machine that you would call a new machine which is 4619 was received in 1947. Your examination shows that these machines in the 3800, 4200 and 4600 series are in good condition.

I am sure that you are acquainted with what we are trying to work out as far as our [illegible] machines are concerned. If you, therefore, feel that it could be arranged if the rental will stay the same on the new machines at a unit charge per pair of .003 we would like to have the machines replaced with new assembling machines.

Thanking you for your cboperation in this matter, we are,

Very truly yours,

THE HANOVER SHOE, INC.

R. F. Purtell

RFP/cmf

**Defendant's Exhibit 15(A)**

(See Opposite) ☞

Defendant's Exhibit 15(A)

August 10, 1953

Mr. C. E. Heinbach
United Shoe Machinery Corporation
131 Centennial Avenue
Hanover, Pennsylvania

Dear Sir:

I wish to acknowledge and thank you for your letter of August 6th in which you have very thoroughly outlined to us your suggestions regarding our fibre fastening machine and Universal slugging machine.

We are following your suggestions and requesting that these two machines be replaced and we have this date forwarded to our Mr. Schue your orders and letters to have them signed and sealed and returned to you.

We thank you for your assistance in this matter.

Yours very truly,

THE HANOVER SHOE, INC.

R. F. Purtell

RFP/cmf

**Defendant's Exhibit 15(B)**

(See Opposite) ☞

Defendant's Exhibit 15(B)

August 13, 1953

United Shoe Machinery Corporation

[illegible]

[illegible]

Gentlemen:

We are considering the surrender of the following leased machines for the reasons noted:

| Machine & Model | No. | Reasons | Motor Drive |
|---|---|---|---|
| [illegible] | [illegible] | To be replaced with new | No |
| " " " " | [illegible] | machines. | No |
| [illegible] | [illegible] | | No |
| " " " | [illegible] | | No |
| " " " | [illegible] | | No |
| | | | |
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| | | | |
| | | | |

If the machines are surrendered at this time, will you accept them and terminate leases under which they are held?

We do ~~XXXXXX~~

We do not desire to have all rights of deduction to which we are entitled applied to deferred payments.

[illegible]

Reynard L. Nutell

F 3222 REV-2

## Defendant's Exhibit 33 (Admitted R. 548), Page 15

### THE HANOVER SHOE, INC.

**Meeting Held 8/26/55—L. B. Sheppard, A. W. Cadwell, R. F. Purtell and P. E. Spears present**

**Special Notes made pertaining to machines which are to be leased from United Shoe Machinery Corporation**

| Description of Machine | Model | No. of Machines | Notes |
|---|---|---|---|
| Insole Lip Cutting Scoring | E | 1 | There is a new machine coming out with delivery expected the latter part of Sept. 1955. It was decided to lease this machine until the new machine is available. This machine goes to Form "B" lease in December of 1956. Mr. Sheppard said that we could decide at that time whether to buy the new machine or purchase this United machine. |
| USMC Edging | B | 2 [Bought 6/56] | These machines go to Form "B" lease terms on 3/2/58. It was decided to wait until we have to switch over to Form "B" lease terms before determining whether to lease or buy. |
| Rex Pulling Over | C | 13 [Bought 13 6/56] | We are looking for a new model. First lease changes to Form "B" on 12/9/58. L. B. Sheppard said to think a long time before signing Form "B" lease. |
| Economy Insole Lip Setting [#725] | B | 1 | There is a new combination machine coming out.. [(This mach. was returned 5-15-56.)] |
| USMC Edge Trimming | L | 10 [Bought 9 6-9/56] | Postpone buying temporarily awaiting development of Hawks machine. |
| Rapid Folding | J | 5 | Postpone buying temporarily until Thermo Plastic machine develops. |
| USMC Wiring | E | 1 | Do not buy since it is a low yield machine. |
| USMC Twin Edge Setting | F | 1 | This machine may be surplus and returned later. |
| Rapid Folding | J | 2 [Bought 7 6/56] | These machines may be returned later. |

(Material in brackets [ ] is in handwriting)

# Defendant's Exhibit 33 (Admitted R. 548) Page 22

## THE HANOVER SHOE, INC.

### Machines which The Hanover Shoe, Inc. expects to continue leasing from United Shoe Machinery Corp.

| Description of Machine | Model | (Yrs.) Age of Machines | No. of Machines | Total Annual Rental and Unit Costs Under Form B | Net Cost of Purchase | Average Years to Recover our Investment if Purchased | |
|---|---|---|---|---|---|---|---|
| Insole Lip Cutting Scoring | E | 13 | 1 | 117.00 | 261.00 | 2.23 | [New machine coming out — Delivery will be the latter part of September, 1955. Lease this machine until the new is available. Goes to Form B 12-56. LBS said to buy the new one or this one.] |
| USMC Edging | B | 34 | 2 | 582.00 | 1,960.80 | 3.37 | [3/2/58 goes to Form B—Pay 1.50 per month now and 8,000 units minimum—Goes to 20.25 per month and .10 per 100 units —Wait and see.] |
| Goodyear Auto. Sole Leveling | D | | 3* | | | | |
| Rex Pulling Over | C | 43 | 13 | 12,468.82 | 71,917.25 | 5.77 | [Are looking for a new model. First lease to Form B on 12-9-58. LBS said to think long time before signing Form B Lease.] |
| Economy Insole Lip Setting | B | 4 | 1 | 174.00 | 680.37 | 3.91 | [New combination machine coming out] |
| X Universal Slugging [Buy both per meeting on 8/26/55] | | 2 | 2 | 450.00 | 1,956.26 | 4.35 | [Question on the use of leather heels in the future. Some days we use both machines to capacity. Oct. 1, 1963 and Oct. 2, 1963 these machines go over to form B lease rate. *Buy these machines.*] |

* Will send back to U. S. M. C.

649

| | Description of Machine | Model | (Yrs.) Age of Machines | No. of Machines | Total Annual Rental and Unit Costs Under Form B | Net Cost of Purchase | Average Years to Recover our Investment if Purchased | |
|---|---|---|---|---|---|---|---|---|
| | Goodyear Inseam Trimming | C | 2* | | | | | |
| X | Goodyear Welt Butt. & Tack. [Buy them both] | B | 7 | 2 | 6,458.01 | 16,806.40 | 2.60 | [*Buy these machines because of capital return*] |
| | USMC Edge Trimming | L | 86 | 10 | 1,350.00 | 3,606.02 | 2.67 | |
| | [Postpone buying temporarily awaiting development of Hawks] | | | | | | | |
| | Rapid Folding | J | 10 | 5 | 795.00 | 3,174.15 | 3.99 | |
| | [Postpone buying temporarily until Thermo plastic machine develops] | | | | | | | |
| | USMC Wiring | E | 1** | 1 | 114.00 | 626.25 | 5.49 | |
| | [Do not buy since it is a low yield machine] | | | | | | | |
| | USMC Twin Edge Setting | F | 1** | 1 | 210.00 | 1,350.00 | 6.43 | |
| | [This machine may be surplus and returned later.] | | | | | | | |
| | Rapid Folding | J | 4 | 2 | 318.00 | 1,269.66 | 3.99 | |
| | [This machine may be returned later] | | | | | | | |
| | Totals | | [196] | [41] | [16,128.82] | [84,845.50] | [37.85] | |
| | | | 205 | 45 | 23,036.83 | 103,608.16 | 44.80 | |

* Will send back to U. S. M. C.
** Machines shipped in 1954 and 1955 taken as 1 year old
[X Decided on 8/26/55 to purchase these machines]

4.07 Avg. Yrs. to Recover Invest.
11) 44.80 Total Avg. Yrs. to Recover Investment

18.64 Avg. Age of Machine
11) 205 Total Age Years

[THIS WAS NOT CORRECT—SHOULD HAVE BEEN 41.]

[ 4.21 AVG. YEARS TO RECOVER INVEST.]
[9) 37.85

[ 4.78 AVG. AGE OF MACH.]
[41) 196 ]

(Material in brackets [ ] is in handwriting)

**Defendant's Exhibit 34 (part)**

# SALES PRICES FOR OUTSTANDING SHOE MACHINERY

**A Basis for Negotiation**

**Prepared for**
**National Shoe Manufacturers Association**

**by**

**Andrews, Anthony & McLean**

**in Association with The American Appraisal Co.**

## NOTE

**The points of law in this report, particularly the discussion of the requirements and objectives of the Final Decree, are statements of the views of counsel for National Shoe Manufacturers Association.**

**Revised May 7, 1955**

ANDREWS, ANTHONY & McLEAN
808 Memorial Drive
Cambridge 39, Massachusetts

KENNETH R. ANDREWS
ROBERT N. ANTHONY
JOHN G. McLEAN

April 27, 1955

Mr. Samuel Slosberg, President
National Shoe Manufacturers Association
342 Madison Avenue
New York 17, New York

Dear Mr. Slosberg:

This letter transmits the report embodying the factors that the Technical Committee, at its meeting of April 26,

1955, authorized for use as a basis for negotiations with United Shoe Machinery Corporation on the prices of outstanding machines. Copies of the report will be handed to United's Counsel today.

The six annexes referred to in the report do not accompany it, but will be transmitted in the near future.

The American Appraisal Company was associated in the preparation of this report, especially the section dealing with the "profile" of prices of outstanding machines and the related Annex VI.

The points of law in the report, particularly the discussion of the requirements and objectives of the Final Decree, are statements of the views of counsel for National Shoe Manufacturers Association.

Respectfully yours,

C. J. SCHWINGLE
First Vice President
American Appraisal Company
ROBERT N. ANTHONY
Partner
Andrews, Anthony & McLean

## ANNEX I

## COST OF CAPITAL

### I. INTRODUCTION

This Annex has two main sections. In the first part we will review Dr. Dean's analysis of the cost of capital rele-

vant in this proceeding. Our analysis of his data and procedures reveals a series of biases which lead him seriously to understate the cost of capital involved in this case. In the second section we go on to develop our own estimates of the cost of capital, taking account of additional data which our intensive search has uncovered. Our statistical analysis of the entire body of data—that used by Dr. Dean supplemented with the additional figures we were able to find—leads to an estimate of 18+ per cent as our best estimate of the cost of capital involved in this proceeding.

## A. *Points of Agreement*

At the outset it should be emphasized that we are in agreement with Dr. Dean regarding:

1. The meaning to be attached to the concept of a company's cost of capital;
2. The premise that the cost of capital of a shoe manufacturer can best be estimated by taking the weighted average of the costs of his equity capital, his preferred stock, and his debt;
3. The premise that retained earnings should be included as equity capital in these calculations; and
4. The premise that the costs of each type of capital must be estimated after allowing (a) for the "underpricing" (or discount from current prices) necessary to secure market acceptance of a new issue, and also (b) for the costs of flotation (underwriters' commission, selling expenses, registration expenses, and so forth).

On all of these important questions, there are no differences between our position and Dr. Dean's position. With respect to these matters, our only differences with the Dean Report involve the elimination of biases and distortions in the statistical procedures by which he attempted to measure some of these elements.

With one exception we also agree with Dr. Dean's statement of the *purpose* of these estimates as given on pages 1 and 2 of Appendix III of his Report. Dr. Dean takes the position on page 2 of Appendix III (and in the body of his report) that "a shoe factory should accept capital proposals that are more profitable than its cost of capital and should reject proposals whose rates-of-return are less than its cost of capital." As emphasized elsewhere in this presentation, the rate of return which a shoe manufacturer will properly require and expect on the funds invested in a piece of shoe machinery will exceed the *cost* of the capital funds so invested by the amount of the additional allowances which the manufacturer must prudently make to cover the heavy and special risks involved in this type of investment. The character of these risks, and our analysis of the additional allowance which should be made for them is given in Section IV-B-2 of the summary report and in Annex II.

In order to avoid confusion, it is important to bear in mind constantly that this Annex deals exclusively with the *costs* of funds for capital investment, that Annex II deals with allowance for machinery risk, and that the proper required rate of earnings in setting equivalent prices is the *sum* of these two figures. We are in agreement with Dr. Dean that it is necessary to have the best possible estimates of what the cost of capital is, and we are in agreement with

him on the definition of the concept to be measured in finding the cost of capital of any shoe company. In this connection our difference with the Dean Report is simply that the Report maintains that the cost of capital by *itself* is the proper figure for a shoe manufacturer to require new investments to earn prior to capital charges in order to be profitable. We maintain that the required earnings are *higher* than this figure.

* * * * *

### III. Estimates of Cost of Capital of Typical Shoe Manufacturer

It will be recalled that we are in complete agreement with the Dean Report on the meaning of the concept of a company's cost of capital, and that the best estimate of the cost for any given company is obtained by taking a weighted average of the probable costs of its equity capital (including retained earnings), its preferred stock, and debt. We also agree with the position of the Dean Report that

> "... the purpose ... (is) to find prices that would be substantially equivalent to lease terms in the future ... (and that) ... the best basis for such a projection ... of the 'normal' cost of capital that would prevail in the future ... is an average of the recent past which irons out random movements from year to year and cyclical savings in the stock market." (Appendix III, page 7)

We believe, however, that our estimate of the costs of capital for the typical shoe manufacturer should be the best

estimate which can be made on the basis of *all* the evidence available on the costs of capital for shoe companies. This conviction led us to do two things.

First of all, we searched all the available records to get all the relevant data we could find. We obtained three different recent directories of shoe manufacturers in the United States, as well as the membership list of the National Shoe Manufacturers Association. Every name appearing in one or more of these lists was then checked against the *National Monthly Stock Summary*[1] and the *Bank and Quotation Record.*[2] These two sources give the most inclusive and reliable tabulations of the price quotations on stocks in the over-the-counter market, and the latter has a complete coverage of quotations involved in transactions on all the major stock exchanges in the country.[3] We then obtained data on per share earnings, capital structure, sales, total assets, and dividends from listings in Moody's Investors Service, supplemented in some cases by direct correspondence with the companies and by information secured through Dun and Bradstreet. This search, virtually completed before Dr. Dean's worksheets were available to us, gave us data for

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[1] Published by the National Quotation Bureau, Inc., New York, New York.

[2] Published monthly by William B. Dana Company, New York, New York.

[3] We included companies from the over-the-counter market only in those instances where we could find at least six quotations during any given year. Entries for individual months were the high bid and the low asked price. We then averaged all such data for the average figure for the year. In some months for some companies there was more than a 20 per cent spread between the bids and asks (or there were several different "high bids" in different months, but no asks). In these cases we use an average price 10 per cent greater than the average of the monthly high bids available.

three or more years on a total of twenty-nine shoe manufacturing companies. This was seven more than the twenty-two *shoe* companies in Dr. Dean's list. Most of the additional firms were smaller companies, information on which is especially important in this proceeding. For reasons already given, we omitted data for any company for years in which sustained losses and both earnings and price data were not available for all years in every case. This extensive search of the records gave us 207 company-years of data.[1]

Secondly, in view of the importance of making the estimates as reliable as possible, and the limited amount of data which even our exhaustive search had uncovered, we believed it was imperative that the estimates be based on the procedures that would make use of the indications of all the available evidence most efficiently. This clearly called for a cross-sectional multiple regression analysis of all the available data on all the companies, and this is the procedure we adopted in making the vital estimate of the required earnings-price ratio for the common stock of the typical shoe manufacturing company.

With this background, we proceed to describe our estimates of the costs of capital for the typical shoe manufacturer. It will be recalled that, if the Decree is interpreted to mean literally the typical or median shoe manufacturer, we need estimates for the cost of capital of such a company.

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[1] In addition to loss years, we excluded two observations where earnings per share were reported to be $0.01 and $0.02, which are so small as not to be significantly above zero in view of the inherent uncertainty in certain aspects of income measurement from accounting records, and would give unreliable ratios to earnings. We did, however, include all other reports of positive earnings even when they represented very sharp declines from previously prevailing levels of earnings.

with assets of approximately $500,000. On the other hand, if the Decree referred to the manufacturer of the typical or *median shoe,* we need to consider the probable costs, based on all the information available, of a shoe manufacturer with assets of between $3 and $4 million. We will use an asset figure of $3.5 million for this company.

A. *Earnings-Price Ratio for Common Stock*

We made a multiple regression analysis of the new relation between earnings-price ratio and (a) asset size of company, (b) the company's capital structure measured by its equity-debt ratio, (c) its dividend payout, and (d) the time within the eight-year period to which each of our 207 observations referred. The regression as a whole had a relatively high degree of statistical significance—much higher than is common in most cross-section studies of data for different companies.[1] The *net* relation between earnings-price ratios and asset size showed that *the earnings yields required in the market on shoe stocks was very significantly higher the smaller the company* even after allowing fully and separately for the effects of the other factors that affected this ratio.[1] We did not find that the effect of the equity-debt ratio was significant, and we wanted to find the value of the earnings-price ratio as it *averaged* over the postwar period. We consequently set these two

[1] The multiple correlation coefficient was .429. Such a value would arise by chance from an uncorrelated universe of as few as 45 independent elements less than five times in a hundred, while values higher than .351 will be found less than 1 per cent of the time if this is no true correlation and the sample has the equivalent of only 100 independent observations.

variables equal to their average values and had the following estimating equation:

$$E/P = 15.83 - .089\ (A=17.6) - .058\ \left(\frac{D}{E} - 57.8\right)$$

where E/P is the earnings-price ratio in percentage points, A is asset size in millions of dollars and D/E is the percentage of earnings paid in dividends. Using a normal dividend payout of 60 per cent, this indicated that the market in the postwar years required an earnings-price ratio of 16.95 per cent on the common stock of companies with $3.5 million assets, and 17.22 per cent for smaller companies with assets of only $500,000. It should be noted that smaller companies probably would not pay out this large a fraction of their earnings in dividends as a general practice and that lower dividend payouts would mean that their earnings yields required on the stock would be higher than their 16.95 and 17.22 per cent we have calculated. Nevertheless, we have used these figures to be conservative in our calculations and conclusions.

B. *Cost of Equity Capital*

These earnings-price ratios had to be adjusted to allow for underpricing and costs of flotation. We used the same

[1] The net regression coefficient was —.089 between earnings-price ratio measured in percentage points and asset size in millions of dollars. This was *3.8 times* its "standard deviation" on the basis of 207 observations, a value which could arise by chance if the true value were zero very much less than 1 per cent of the time, providing the observations were truly independent. As an allowance for this latter factor, we may note that this coefficient would still be significant at the 5 per cent level if we deal with no more than the equivalent of sixty fully independent observations. On this basis the appropriate standard error would be .043 and the odds in favor of our conclusion would be better than 19 to 1.

adjustment of 15 per cent which Dr. Dean used for *underpricing*. This involved raising the previous figures in the ratio of 1.00/.85, which gave figures of 19.94 per cent and 20.26 per cent respectively for $3.5 million and $500,000 companies.

We have already seen that the best available evidence indicated that *costs of flotation* are 14.3 per cent and 17 per cent for these two sizes of companies. Adjusting the preceding figures to allow for these cost of flotation gave our final estimates of the costs of equity capital for shoe manufacturers. Those estimates are 23.28 per cent for the $3.5 million company producing the *median shoe* and 24.41 per cent for the *median shoe* company having assets of $500,000.

C. *Costs of Preferred Stock Capital*

For the dividend yield required on preferred stock of shoe companies, we simply used the data in Table III-5 of the Dean Report. As previously noted,[1] these data tend to show that these requirements are higher for smaller companies, so we used the average of the figures shown in the Table for the three smallest companies having preferred stock outstanding, this average for the dividend yield being 6.17 per cent. Again, we used Dr. Dean's adjustment of 15 per cent to allow for underpricing, but for the *cost of issuing* preferred stock we used the data given on page A-16 above which the SEC Studies show to be the appropriate

[1] Page A-16 above.

allowance for these small companies. On this basis we find that the cost of issuing preferred stock would be 8.38 per cent to the $3.5 million company and 8.44 per cent to the $500,000 median shoe manufacturer.

D. *Cost of Debt*

The smaller shoe companies in Table III-5 of the Dean Report had, after taxes, costs of bonded debt that ranged from 2.0 per cent to 3.0 per cent or from 4 to 6 per cent before taxes. But these figures are too low for smaller companies because the Dean Report allowed only 1.0 per cent for costs of flotation whereas the SEC data given above on pages A-11, 12 and 16 show these costs average as high as 8 to 10 per cent for the issues of smaller companies. Moreover, it is well known that the costs of bank borrowing by smaller companies tend to fall in the range of 4 to 6 per cent, if not higher. Studies of the costs of debt to different sizes of companies have uniformly shown that inherent rates and costs are progressively higher for smaller companies than for larger ones.[1] It is also known that the shoe industry is one in which factoring is most common, and that the use of this source of capital—whose annual cost before taxes runs as high as 10 to 14 per cent—is predominantly found among smaller companies.

The net of all such evidence is that an estimate of 3 per cent is probably a substantial understatement of the cost of

[1] See, for example, "Structure of Interest Rates on Business Loans", *Federal Reserve Bulletin*, July, 1947.

debt after allowing for taxes for small shoe manufacturers. Even though the figure is a very conservative one, we have used it in our final estimate.

E. *Final Estimates of the Cost of Capital*

A company's over-all cost of capital is the weighted average of the costs of common equity, preferred stock, and debt. In making these estimates, we assumed that both the $3.5 million and the $500,000 company had common equity equal to 74 per cent of its total capital.[2] We then assumed that 5 per cent of the total is preferred stock and 21 per cent debt. For the larger of these companies—that producing the median shoe—this gave 18.4 per cent as our estimate of the over-all cost of capital to the manufacturer. The corresponding figure for the median shoe company with $500,000 assets is 19.1 per cent.

Since the proportions of preferred stock and debt within the 26 per cent of capital other than common equity are quite uncertain, we have added one final set of figures in the interest of conservatism. Since preferred stock costs more than debt, we have considered the limiting case which arises when all capital other than common stock consists of debt and there is no preferred stock outstanding at all. The results given in Exhibit I-6 show that even under this lim-

[2] We failed to find any significant pattern of relationship between the equity-other capital ratio and company size among the companies for which we had data. The average of the ratio of the market value of equity to sum of this value plus preferred stock, noncurrent debt, and notes payable is for all companies in the sample 74 per cent.

*Defendant's Exhibit 34 (part)*

iting situation, *the costs of capital are no less than 18 per cent for either firm.*

On the basis of this analysis, we have used 18 per cent as the cost of capital in all other calculations in this report.

• • • • •

**Defendant's Exhibit 48**

(See Opposite) ☞

TABLE III

ASSUMPTIONS A*

THE ECONOMIC COST OF LEASING: EFFECT OF THREE ELEMENTS OF ECONOMIC COST ON LEIDESDORF'S COMPUTATION OF NET COSTS OF LEASING (Plaintiff's Exhibit 41), 1939-1955

| | 1939 | 1940 | 1941 | 1942 | 1943 | 1944 | 1945 | 1946 | 1947 | |
|---|---|---|---|---|---|---|---|---|---|---|
| Plaintiff's Exhibit 41 (the Leidesdorf fourth computation) does not state correctly the economic costs of leasing. | | | | | | | | | | |
| 1. Leasing costs are overstated to the extent that capital would have been recovered through tax savings when rentals were deducted from income as an expense. | | | | | | | | | | |
| (a) Leidesdorf computed net costs of leasing (Exhibit 41). | $ 25,520 | $ 57,258 | $ 94,046 | $ 107,880 | $ 106,245 | $ 103,660 | $ 98,933 | $ 96,319 | $ 101,590 | $ 11 |
| (b) Relevant rate at which income was taxed. | 24.2% | 28.9% | 67.7% | 90.7% | 93.7% | 99.7% | 89.2% | 91.8% | 91.7% | |
| (c) Capital recovered through tax savings: i.e., the relevant tax rate (Item b ) times net costs of leasing (Item a ). | $ 6,174 | $ 16,548 | $ 63,669 | $ 97,847 | $ 99,552 | $ 103,312 | $ 88,248 | $ 49,261 | $ 92,363 | |
| (d) Net capital employed in leasing: i.e., net costs of leasing (Item a) less capital recovered through tax savings (Item c). | $ 19,344 | $ 40,710 | $ 30,377 | $ 10,033 | $ 6,693 | $ 348 | $ 10,685 | $ 54,058 | $ 39,227 | $ 4 |
| 2. Leasing costs are understated because no account is taken of the future worth of net working capital employed. | | | | | | | | | | |
| (a) The future worth of net capital employed (its value on September 21, 1955) is calculated by multiplying the net capital employed in leasing (Item 1 d) by a factor which compounds the annual figure at 11%. (Hanover's cost of capital) | 9.2765 | 8.1372 | 7.1379 | 6.2613 | 5.4924 | 4.8179 | 4.2262 | 3.7072 | 3.2519 | |
| (b) Future worth of net capital employed in leasing (Item 2 (a) times Item 1 (d)). | $ 179,445 | $ 331,269 | $ 216,828 | $ 62,820 | $ 36,761 | $ 4,495 | $ 45,157 | $ 207,818 | $ 127,600 | $ 18 |

* ASSUMPTIONS A - This term is used here to indicate that identical "assumptions" are used in the development of this Table as were used in Leidesdorf's "fourth computation" accompanying [illegible] to Donovan, Leisure, Newton & Irvine, dated April 19, 1961. These assumptions are set forth in an appendix accompanying that computation entitled, "Assumptions and Data Used in Computation of Net Costs of Leasing and Net Costs of Ownership for Machine Types 01 through 820 from July 1, 1939 to September 21, 1955". Principal among these assumptions were the following:

". . . Service costs are assumed to be the same under leasing or ownership, accordingly such costs are deducted from rental and royalty charged."

"The determination of machinery lives is based upon historical data of shipments to and returns from "Hanover" to "United" as set forth in answers to interrogatories dated April 9, 1959, by "United"."

"The unit cost of the machinery acquired in the various years was computed by applying the adjusted Consumer Price Index to the January 1, 1955 unit cost."

"The unit cost of the used machinery disposed of in the various years was computed by applying the adjusted Consumer Price Index to the January 1, 1955 used machinery unit cost."

| | 1943 | 1944 | 1945 | 1946 | 1947 | 1948 | 1949 | 1950 |
|---|---|---|---|---|---|---|---|---|
| 80. | $ 106,245 | $ 103,660 | $ 98,933 | $ 96,319 | $ 101,590 | $ 113,238 | $ 126,181 | $ 136,260 |
| % | 93.7% | 98.7% | 89.2% | 41.8% | 41.7% | 41.5% | 41.4% | 60.5% |
| 47. | $ 99,552 | $ 102,312 | $ 88,248 | $ 40,261 | $ 42,363 | $ 46,994 | $ 52,239 | $ 82,437 |
| 33 | $ 6,693 | $ 1,348 | $ 10,685 | $ 56,058 | $ 59,227 | $ 66,244 | $ 73,942 | $ 53,823 |
| 613 | 5.4924 | 4.8179 | 4.2262 | 3.7072 | 3.2519 | 2.8526 | 2.5023 | 2.1950 |
| 20 | $ 36,761 | $ 6,495 | $ 45,157 | $ 207,818 | $ 192,600 | $ 188,968 | $ 185,025 | $ 118,141 |

re used in Leidesdorf's "fourth computation" accompanying their letter
mputation entitled, "Assumptions and Data Used in Computation of Set
l among these assumptions were the following:
and royalty charged."
as set forth in answers to interrogatories dated April 9, 1955, by "United"."
the January 1, 1955 unit cost."
Index to the January 1, 1955 used machinery unit cost."

| | 1951 | 1952 | 1953 | 1954 | 1955 | Total |
|---|---|---|---|---|---|---|
| | | | | | | |
| | | | | | | |
| | | | | | | |

**Defendant's Exhibit 49**

(See Opposite) ☞

TABLE IV

DERIVATION OF MARGINAL INCOME TAX RATE FOR THE HANOVER SHOE, INC.

| | EFFECTIVE FEDERAL TAX RATE | EFFECTIVE PENNSYLVANIA TAX RATE | | | | | MARGINAL TAX RATE |
|---|---|---|---|---|---|---|---|
| | Determined from Hanover's Federal Tax Returns. This is the percent of total Federal income tax that would have been paid on any additional dollar of net income. | TAXABLE MARGINAL INCOME LESS DEDUCTIONS: Federal income tax allowed as deduction 1939 to 1942. Computed as 1.00 minus Federal rate. | ALLOCATION PERCENT: Obtained from statements attached with Hanover's Federal returns. This allocates the percent of additional dollar that is subject to State tax. | ALLOCATED MARGINAL INCOME: Product of the Columns (3) times (4) for 1939 to 1942. 1943 to 1955 taken from Column (4) | PENNSYLVANIA TAX RATE: From Prentice-Hall Tax Service Book. (This is a "flat" rate for all income.) | EFFECTIVE PENNSYLVANIA TAX RATE: Product of (5) times (6) | Sum of Columns (2) plus (7). This is the percent of additional dollar of income that would be paid out as taxes. |
| (1) | (2) | (3) | (4) | (5) | (6) | (7) | (8) |
| 1939 | .19 | .810 | .9240 | .7484 | .07 | .052 | .242 |
| 1940 | .24 | .760 | .9257 | .7035 | .07 | .049 | .289 |
| 1941 | .655 | .345 | .9298 | .3208 | .07 | .022 | .677 |
| 1942 | .90 | .100 (Federal tax was not deducted hereafter) | .9357 | .0936 | .07 | .007 | .907 |
| 1943 | .90 | 1.000 | .9362 | .9362 | .04 | .037 | .937 |
| 1944 | .95 | 1.000 | .9327 | .9327 | .04 | .037 | .987 |
| 1945 | .855 | 1.000 | .9324 | .9324 | .04 | .037 | .892 |
| 1946 | .38 | 1.000 | .9412 | .9412 | .04 | .038 | .418 |
| 1947 | .38 | 1.000 | .9201 | .9201 | .04 | .037 | .417 |
| 1948 | .38 | 1.000 | .8790 | .8790 | .04 | .035 | .415 |
| 1949 | .38 | 1.000 | .8466 | .8466 | .04 | .034 | .414 |
| 1950 | .571 | 1.000 | .8513 | .8513 | .04 | .034 | .605 |
| 1951 | .5075 | 1.000 | .8431 | .8431 | .05 | .0422 | .550 |
| 1952 | .52 | 1.000 | .8597 | .8597 | .05 | .043 | .563 |
| 1953 | .52 | 1.000 | .8873 | .8873 | .05 | .044 | .564 |
| 1954 | .52 | 1.000 | .8569 | .8569 | .05 | .043 | .563 |
| 1955 | .52 | 1.000 | .8757 | .8757 | .05 | .044 | .564 |

TABLE IV (Continued)

DERIVATION OF MARGINAL INCOME TAX RATE FOR THE HANOVER SHOE, INC.

The rates shown here were derived with the assistance of the personnel in USMC Tax Department. The comments made below are the rationale used by them to derive the rates shown in the "Effective Federal Tax Rate" column.

| Year | Federal Normal Income Tax Rate | Federal Excess Profits Tax Rate Applicable to Hanover | Comments | Effective Federal Tax Rate |
|---|---|---|---|---|
| 1939 | 19% | - | No excess profits statute. Effective Federal tax rate is normal rate | 19% |
| 1940 | 24 | no tax | Excess profit statute, but Hanover has no excess profits. Effective rate is normal rate. | 24 |
| 1941 | 31 | 50% | Hanover has excess profits. Excess profits tax is deductible from normal tax income, hence tax is 50% of additional dollar plus 31% of remaining 50% of additional dollar. | 65.5 |
| 1942 | 40 | 90 | Excess profit tax not deductible from normal tax income, but normal tax does not have to be paid on additional dollar taxed at excess profit rate. | 90 |
| 1943 | 40 | 90 | Same as above. | 90 |
| 1944 | 40 | 95 | Same as above. | 95 |
| 1945 | 40 | 85.5 | Same as above. | 85.5 |
| 1946 | 38 | - | No excess profits statute. Effective tax rate is normal rate. | 38 |
| 1947 | 38 | - | Same as above. | 38 |
| 1948 | 38 | - | Same as above. | 38 |
| 1949 | 38 | - | Same as above. | 38 |
| 1950 | 42 | 30% (15.1) | Excess profits statute. Hanover has excess profits. Additional dollar would be taxed at 42% plus 30% as excess profit rate, but 30% was in effect only 184 days out of 365 days, which makes the rate 15.1% on an annual basis. Marginal tax is sum of 42% plus 15.1%. | 57.1 |
| 1951 | 50.75 | no tax | Excess profit statute, but Hanover has no excess profits. Effective rate is normal rate. | 50.75 |
| 1952 | 52 | no tax | Same as above. | 52 |
| 1953 | 52 | no tax | Same as above. | 52 |
| 1954 | 52 | - | No excess profits statute. Effective rate is normal rate. | 52 |
| 1955 | 52 | - | Same as above. | 52 |

**Defendant's Exhibit 51**

(See Opposite) ☞

TABLE VI

ASSUMPTIONS A*

THE ECONOMIC COST OF OWNERSHIP: EFFECT OF THREE ELEMENTS OF ECONOMIC COST ON LEIDESDORF'S COMPUTATION (Plaintiff's Exhibit 44b), 1939-1955

| | 1939 | 1940 | 1941 | 1942 | 1943 | 1944 | 1945 | 1946 | 1947 | 19 |
|---|---|---|---|---|---|---|---|---|---|---|
| The ownership calculations in Plaintiff's Exhibit 44, as computed by Leidesdorf, do not state the full economic costs of ownership; they do not reflect the effect of income taxes, capital gains taxes, and the cost of the capital employed. | | | | | | | | | | |
| 1. Ownership costs are overstated to the extent that capital would have been recovered through tax savings when depreciation was deducted from income. | | | | | | | | | | |
| (a) Cost of new machinery acquired as determined by the Consumer Price Index (derived from Plaintiff's Exhibit 44). | $ 356,490 | + | $ 48,436 | $ 57,292 | $ 21,916 | $ 4,783 | $ 7,368 | $ 8,008 | $ 14,595 | $ 25 |
| (b) Depreciation calculated on 10-year straight-line method. | $ 17,825 | $ 35,649 | $ 40,493 | $ 46,222 | $ 48,414 | $ 49,092 | $ 49,529 | $ 50,330 | $ 51,790 | $ 54 |
| (c) Relevant rate at which income would have been taxed. | 24.2% | 28.9% | 67.7% | 90.7% | 93.7% | 98.7% | 89.2% | 41.8% | 41.7% | 41 |
| (d) Capital recovered through depreciation; i.e., tax rate (Item c) times depreciation (Item b). | $ 4,314 | $ 10,303 | $ 27,414 | $ 41,923 | $ 45,364 | $ 48,454 | $ 44,180 | $ 21,038 | $ 21,596 | $ 22 |
| (e) Cost of new machinery acquired (Item a) less capital recovered through depreciation (Item d). | $ 352,176 | $ ( 10,303) | $ 21,022 | $ 15,369 | $ ( 23,448) | $ ( 41,671) | $ ( 39,812) | $ ( 13,030) | $ ( 7,001) | $ 2 |
| 2. Ownership costs are understated to the extent that disposal recoveries would have been reduced by necessity of paying capital gains taxes on all recoveries in excess of book value of disposed of machines. | | | | | | | | | | |
| (a) Disposal recoveries as determined by Consumer Price Index (derived from Plaintiff's Exhibit 44). | + | + | + | + | + | + | + | + | + | + |
| (b) Disposal recoveries subject to capital gains tax. | + | + | + | + | + | + | + | + | + | + |
| (c) Relevant tax rate. | + | + | + | + | + | + | + | + | + | + |
| (d) Capital gains taxes; recoveries subject to tax (Item b) multiplied by the relevant tax rate (Item c). | + | + | + | + | + | + | + | + | + | + |
| (e) After-tax disposal recoveries would be disposal recoveries (Item a) less capital gains taxes (Item d). | + | + | + | + | + | + | + | + | + | + |
| 3. In calculating economic costs of ownership, it is necessary also to consider the future worth of net capital employed. | | | | | | | | | | |
| (a) (i) Ownership costs adjusted for income taxes (Item 1 e). | $ 352,176 | $ ( 10,303) | $ 21,022 | $ 15,369 | $ ( 23,448) | $ ( 41,671) | $ ( 39,812) | $ ( 13,030) | $ ( 7,001) | $ 2 |
| (ii) Disposal recoveries (Item 2 e). | + | + | + | + | + | + | + | + | + | + |
| (iii) Net capital employed in ownership (Item 3 a less Item 3 c). | $ 352,176 | $ ( 10,303) | $ 21,022 | $ 15,369 | $ ( 23,448) | $ ( 41,671) | $ ( 39,812) | $ ( 13,030) | $ ( 7,001) | $ 2 |
| (b) Future worth of net capital employed (the value on September 21, 1955) is calculated by multiplying the net capital employed by a Future Worth factor. | | | | | | | | | | |
| (i) Factor which compounds the annual figure at 11% (Hoover's cost of capital). | 9.2765 | 8.3372 | 7.3379 | 6.2613 | 5.4924 | 4.8179 | 4.2262 | 3.7072 | 3.2519 | 2 |
| (ii) Item 3a (iii) times Item 3b (i). | $ 3,266,961 | $ ( 85,838) | $ 154,253 | $ 96,230 | $ ( 128,780) | $ ( 200,762) | $ ( 168,253) | $ ( 48,305) | $ ( 22,767) | $ 7 |

* ASSUMPTIONS A - this term is used here to indicate that identical "assumptions" are used in the development of this Table as were used in Leidesdorf's "fourth computation" accompanying their letter to Donovan, Leisure, Newton & Irvine, dated April 19, 1961. These assumptions are set forth in an appendix accompanying that computation entitled, "Assumptions and Data Used in Computation of Net Costs of Leasing and Net Costs of Ownership for Machine Types #1 through #80 from July 1, 1939 to September 21, 1955."

". . . Service costs are assumed to be the same under leasing or ownership, accordingly both costs are deducted from rental and royalty charges."

"The determination of machinery lives is based upon historical data of shipments to and returns from 'Shipmen' to 'United' as set forth in answers to interrogatories dated April 9, 1956, by 'United'."

"The unit cost of the machinery acquired in the various years was computed by applying the adjusted Consumer Price Index to the January 1, 1955 unit cost."

"The unit cost of the used machinery disposed of in the various years was computed by applying the adjusted Consumer Price Index to the January 1, 1955 used machinery unit cost."

| | 1943 | 1944 | 1945 | 1946 | 1947 | 1948 | 1949 | 1950 | 1951 | 1952 | 1953 | 1954 | 1955 | Total |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| 2 | $ 21,916. | $ 4,783. | $ 1,368. | $ 8,008. | $ 14,595. | $ 25,256. | $ 379,861. | $ 73,366. | $ 183,481. | $ 285,581. | $ 81,418. | $ 184,728. | | $ 1,468,582. |
| 2 | 48,414. | 49,092. | (149,529. | 50,330. | 51,790. | 54,316. | 74,978. | 63,987. | 72,497. | 95,320. | 101,277. | 119,067. | 89,179. | 1,059,440. |
| % | 93.7% | 98.7% | 89.2% | 41.8% | 41.7% | 41.5% | 41.4% | 60.5% | 55.0% | 58.3% | 56.4% | 58.3% | 58.8% | |
| 3 | 45,369. | 48,454. | 49,180. | 21,038. | 24,596. | 22,541. | 30,839. | 38,712. | 38,873. | 53,445. | 57,120. | 67,036. | 58,299. | 629,440. |
| 9 | (23,448. | (41,671. | (39,812. | (13,030. | ( 7,001. | 2,715. | 349,039. | 34,654. | 93,608. | 23,916. | 24,298. | 117,693. | (50,894. | 1,056,926. |
| | — | — | — | — | — | — | 22,397. | — | 50,069. | 58,893. | 53,765. | 86,559. | 955,463. | 1,226,801. |
| | — | — | — | — | — | — | 22,397. | — | 50,069. | 58,893. | 53,765. | 86,559. | 332,825. | 604,961. |
| | — | — | — | — | — | — | 25 % | — | 25 % | 26 % | 26 % | 26 % | 25 % | |
| | — | — | — | — | — | — | 5,599. | — | 12,517. | 14,792. | 14,499. | 22,495. | 83,206. | 153,107. |
| | — | — | — | — | — | — | 16,798. | — | 37,552. | 43,101. | 41,266. | 64,064. | 871,957. | 1,013,694. |
| 9 | ( 23,448. | ( 41,671. | ( 39,812. | ( 13,030. | ( 7,001. | 2,715. | 349,039. | 34,654. | 93,608. | 23,916. | 24,298. | 117,693. | ( 50,894. | 1,056,926. |
| | — | — | — | — | — | — | 16,798. | — | 37,552. | 43,101. | 41,266. | 64,064. | 871,957. | 1,013,694. |
| 9 | ( 23,448. | ( 41,671. | ( 39,812. | ( 13,030. | ( 7,001. | 2,715. | 332,241. | 34,654. | 56,056. | 180,815. | ( 16,968. | 53,629. | (822,751. | ( 14,787. |
| 3 | 5,924. | 4,879. | 2,262. | 3,972. | 3,259. | 2,854. | 2,823. | 2,950. | 1,824. | 4,690. | 4,816. | 1,894. | 1,400. | |
| 1 | (28,280. | (209,762. | (168,253. | (48,905. | (23,767. | 2,795. | 83,351. | 71,464. | 107,958. | 32,588. | ( 26,136. | 48,748. | (1,051,366. | 3,157,473. |

...ve used in Leidenfrost's "Length computation" corresponding sheets ...
...ight computations entitled, "Computations and data used in Com... 1955."
...and royalty charges."
...on for Truth in Concrete to Leidenfrost/Lovich dated ...

...the January 1, 1955 audit cost."
...ter to the January 1, 1955 mine machinery cost audit."

**Defendant's Exhibit 70**

(See Opposite) ☞

THE HANOVER SHOE, INC.

HANOVER, PA., E. BERLIN, PA. AND MIDDLETOWN, MD.

RIGHT OF DEDUCTION FUND

Use of Fund During Fiscal Year

| Balance at End of Fiscal Year, February 28 | | Deferred Payments | For Purchase of Machines | 3 Months Unemployment Credits | Waiver C 4 Larges |
|---|---|---|---|---|---|
| 1940 | $21,438.50 | $1,979.34 | - | None | $25. |
| 1941 | 24,367.10 | 650.50 | - | None | 57. |
| 1942 | 28,592.99 | 1,580.00 | - | None | 16. |
| 1943 | 34,713.71 | 70.00 | - | None | 28. |
| 1944 | 40,255.61 | None | - | $39.93 | 57. |
| 1945 | 44,305.13 | None | - | 55.90 | 71. |
| 1946 | 44,458.13 | None | - | [illegible].46 | 34. |
| 1947 | 46,512.66 | None | - | None | Non |
| 1948 | 48,697.35 | 50.00 | - | 103.86 | 105. |
| 1949 | 50,956.09 | 2,710.00 | - | 106.64 | 111. |
| 1950 | 57,753.07 | 4,676.65 | - | [illegible] | 76. |
| 1951 | 62,948.52 | 1,981.20 | - | [illegible] | 65. |
| 1952 | 60,538.89 | 2,810.50 | - | [illegible] | 42. |
| 1953 | [illegible]045.23 | 4,932.74 | - | 30.[illegible] | 82. |
| 1954 | [illegible]239.82 | 10,706.00 | - | None | 11. |
| 1955 | 49,847.42 | 8,280.83 | - | [illegible] | 18. |
| | (6,600.00 Fund | | | | |
| 1956 | (5,487.60 Spec. Fd. | None | $39,841.21 | None | 67. |
| | | $40,428.26 | | $[illegible] | $672. |

EMMITSBURG, MD.

| | | | | | |
|---|---|---|---|---|---|
| 1948 | - | None | - | | |
| 1949 | - | $ 148.15 | - | None | $ 308. |
| 1950 | - | 975.22 | - | $132.07 | 181. |
| 1951 | - | 831.55 | - | 581.55 | 491. |
| 1952 | - | 8,676.15 | - | 144.00 | 241. |
| 1953 | - | - | - | 6.21 | 81. |
| | | $10,432.92 | | $864.77 | $1,304. |

The Fund for all factories was consolidated into one account February 1, 1949

Waiver Credits year and also the remaining January 1 of t

E HANOVER SHOE, INC.

. BERLIN, PA. AND MIDDLETOWN, MD.

T OF DEDUCTION FUND

Fund During Fiscal Year

| For Purchase of Machines | 3 Months Minimum Credits | Waiver Credits for 4 Largest Months | Total Minimum Charges | For Calendar Year |
|---|---|---|---|---|
| - | None | $25.84 | $25.84 | 193[illegible] |
| - | None | 57.76 | 57.76 | 1940 |
| - | None | 16.63 | 16.63 | 1941 |
| - | None | 28.79 | 28.79 | 1942 |
| - | $39.53 | 57.24 | 97.17 | 1943 |
| - | 55.90 | 71.59 | 127.49 | 1944 |
| - | [illegible].46 | 34.69 | 35.15 | 1945 |
| - | None | None | None | 1946 |
| - | 103.86 | 105.07 | 208.93 | 1947 |
| - | 106.64 | 111.64 | 218.28 | 1948 |
| - | [illegible] | 76.18 | 97.83 | 1949 |
| - | [illegible] | 65.34 | 105.54 | 1950 |
| - | [illegible] | 42.27 | 91.09 | 1951 |
| - | [illegible] | 82.37 | 103.20 | 1952 |
| - | None | 11.31 | 11.31 | 1953 |
| - | None | 18.70 | 18.70 | 1954 |
| $39,841.21 | None | 67.06 | 67.06 | 1955 |
| | [illegible] | $872.43 | $1,280.77 | |

EMMITSBURG, MD.

| | | | | |
|---|---|---|---|---|
| - | | | | |
| - | None | $ 308.57 | $ 308.57 | 1948 |
| - | $132.07 | 181.35 | 313.42 | 1949 |
| - | 581.95 | 491.46 | 1,073.01 | 1950 |
| - | 144.88 | 241.75 | 386.63 | 1951 |
| - | 6.87 | 81.68 | 87.95 | 1952 |
| | $864.77 | $1,304.81 | $2,169.58 | |

Waiver Credits (4 largest months) for each calendar year and also the use of the Fund against the remaining 8 months were made after January 1 of the following year.

**Defendant's Exhibit 73**

(See Opposite) ☞

Defendant's Exhibit 73

REASONS FOR RETURN TO UNITED OR TRANSFER TO OTHER SHOE MANUFACTURERS BY HANOVER OF 418 LEASED UNITED MACHINES BETWEEN 1946 AND SEPTEMBER 21, 1955

| | | Number of Lease Only Machines | Number of Optional Terms Machines | Total Number of Machines |
|---|---|---|---|---|
| A. | Replaced by later model USMC | 28 | 11 | 39 |
| B. | Surplus | 111 | 49 | 160 |
| C. | Unsuccessful trial | 3 | 6 | 9 |
| D. | Replaced by other type USMC | 15 | 0 | 15 |
| E. | Replaced by new machine - same model | 86 | 19 | 105 |
| F. | Per option in Plan for Terminating Form A Leases dated 5/16/55 | 15 | 4 | 19 |
| G. | Replaced by competitive machine | 50 | 5 | 55 |
| H. | Unknown | 12 | 4 | 16 |
| | | 320 | 98 | 418 |

73-1

## 418 LEASED UNITED MACHINES WHICH HANOVER RETURNED TO UNITED OR TRANSFERRED TO OTHER SHOE MANUFACTURERS BETWEEN 1946 AND SEPTEMBER 21, 1955 AND THE REASONS FOR SUCH RETURNS OR TRANSFERS

A. LEASE ONLY MACHINES*

| Machine Type and Serial Number | Year Returned or Transferred | Reason for Return or Transfer |
|---|---|---|
| **1. Goodyear Outsole Rapid Lockstitch D** | | |
| 3405 | 1953 | E |
| 3435 | 1953 | E |
| 3436 | 1953 | E |
| 4440 | 1953 | E |
| 4963 | 1953 | B |
| 5199 | 1952 | B |
| 5900 | 1954 | B |
| 6393 | 1952 | E |
| 6487 | 1954 | B |
| 6586 | 1952 | E |
| 6664 | 1952 | E |
| 6909 | 1954 | E |
| 10680 | 1955 | F |
| 10681 | 1955 | F |
| 10684 | 1955 | F |
| **2. USMC Staple Side Lasting B** | | |
| 1590 | 1952 | E |
| 1608 | 1952 | E |
| 1609 | 1952 | E |
| 1622 | 1954 | E |
| 1631 | 1954 | E |
| 1633 | 1954 | E |
| 1640 | 1954 | E |
| 1642 | 1954 | E |
| 1911 | 1953 | E |
| 1912 | 1953 | E |
| 1914 | 1953 | E |
| 1989 | 1954 | E |
| 1997 | 1954 | E |
| 2393 | 1953 | G |
| 3135 | 1954 | E |
| **3. USMC Heel Seat Lasting E** | | |
| 286 | 1953 | E |
| 320 | 1953 | E |
| 395 | 1953 | E |

*Until January 1, 1955 when sales prices were published for all new machines.

73-2

| Machine Type and Serial Number | Year Returned or Transferred | Reason for Return or Transfer |
|---|---|---|
| 3. USMC Heel Seat Lasting E (cont.) | | |
| 408 | 1953 | E |
| 417 | 1953 | E |
| 426 | 1952 | B |
| 591 | 1949 | B |
| 619 | 1952 | B |
| 955 | 1955 | F |
| 4. USMC Toe Lasting C | | |
| 40 | 1954 | B |
| 241 | 1952 | B |
| 298 | 1952 | B |
| 335 | 1947 | C |
| 451 | 1954 | B |
| 517 | 1954 | B |
| 566 | 1952 | B |
| 5. Goodyear Welt Butting and Tacking B | | |
| 28 | 1952 | B |
| 67 | 1955 | F |
| 6. Rex Pulling Over C | | |
| 3119 | 1949 | E |
| 3125 | 1949 | E |
| 3292 | 1952 | E |
| 3294 | 1952 | B |
| 3295 | 1952 | E |
| 3296 | 1952 | E |
| 3524 | 1952 | E |
| 3525 | 1952 | E |
| 3526 | 1952 | E |
| 3955 | 1952 | B |
| 4090 | 1953 | E |
| 4095 | 1953 | E |
| 4097 | 1953 | E |
| 4227 | 1953 | E |
| 4379 | 1952 | E |
| 4456 | 1952 | E |
| 5803 | 1954 | B |
| 6057 | 1955 | F |



73-3

| Machine Type and Serial Number | Year Returned or Transferred | Reason for Return or Transfer |
|---|---|---|
| 7. McKay Automatic Heel Loading and Attaching B | | |
| 1472 | 1952 | B |
| 2423 | 1952 | B |
| 8. (a) Goodyear Welt Sewing K | | |
| 739 | 1950 | D |
| 795 | 1950 | D |
| 819 | 1949 | D |
| 1273 | 1950 | D |
| 1274 | 1950 | D |
| 1709 | 1950 | D |
| 1710 | 1950 | D |
| 1879 | 1950 | D |
| 2026 | 1950 | D |
| 2069 | 1949 | B |
| 2241 | 1951 | D |
| 2913 | 1951 | D |
| 2920 | 1951 | D |
| 4967 | 1950 | B |
| 5343 | 1951 | D |
| 5522 | 1952 | B |
| 5535 | 1952 | B |
| (b) Goodyear Inseam Sewing B | | |
| 79 | 1954 | B |
| 545 | 1955 | F |
| 9. Goodyear Universal Rounding and Channeling E | | |
| 665 | 1952 | E |
| 924 | 1952 | E |
| 1102 | 1952 | B |
| 1370 | 1952 | B |
| 3063 | 1952 | B |
| 3654 | 1954 | B |
| 10. Goodyear Automatic Sole Leveling D | | |
| 1077 | 1948 | E |
| 1094 | 1949 | E |
| 1176 | 1949 | E |
| 1177 | 1952 | B |
| 1859 | 1952 | B |
| 1964 | 1954 | E |



D3-4

| Machine Type and Serial Number | Year Returned or Transferred | Reason for Return or Transfer |
|---|---|---|
| **11. Goodyear Inseam Trimming C** | | |
| 362 | 1948 | E |
| 419 | 1952 | B |
| 439 | 1953 | B |
| 473 | 1948 | E |
| 1153 | 1952 | B |
| 1825 | 1955 | F |
| **12. Ideal Clicking C** | | |
| 451 | 1953 | B |
| 545 | 1953 | B |
| 962 | 1953 | G |
| 1404 | 1953 | B |
| 2103 | 1953 | B |
| 2174 | 1953 | G |
| 4126 | 1953 | G |
| 4815 | 1949 | B |
| 6580 | 1949 | B |
| 9098 | 1949 | B |
| 9162 | 1953 | G |
| 9881 | 1949 | B |
| 10510 | 1953 | G |
| 10512 | 1953 | G |
| 10675 | 1949 | B |
| 10685 | 1953 | G |
| 10690 | 1949 | B |
| 10722 | 1953 | B |
| 10731 | 1953 | G |
| 11126 | 1951 | H |
| 11138 | 1951 | H |
| 11151 | 1951 | H |
| 11159 | 1951 | H |
| 11163 | 1951 | H |
| 11175 | 1951 | H |
| 11540 | 1954 | G |
| 12034 | 1953 | G |
| 12035 | 1953 | G |
| 12277 | 1954 | G |
| 12318 | 1954 | G |
| 12323 | 1954 | G |
| 16256 | 1953 | G |
| 16265 | 1953 | G |
| 16266 | 1953 | G |



73-5

| Machine Type and Serial Number | Year Returned or Transferred | Reason for Return or Transfer |
|---|---|---|
| 12. Ideal Clicking C (cont.) | | |
| 16267 | 1953 | G |
| 16268 | 1953 | G |
| 16269 | 1953 | G |
| 16288 | 1953 | G |
| 16289 | 1953 | G |
| 16313 | 1949 | B |
| 16315 | 1953 | G |
| 20176 | 1951 | H |
| 22718 | 1949 | B |
| 24738 | 1951 | G |
| 24756 | 1951 | G |
| 25447 | 1951 | H |
| 25497 | 1951 | H |
| 25498 | 1951 | H |
| 25860 | 1951 | H |
| 13. Automatic Heel Compressing 6 | | |
| 119 | 1953 | E |
| 120 | 1954 | E |
| 14. Rex Assembling H | | |
| 1528 | 1952 | E |
| 1535 | 1952 | E |
| 1539 | 1953 | E |
| 1550 | 1953 | E |
| 1595 | 1953 | E |
| 1596 | 1953 | E |
| 1597 | 1953 | E |
| 1598 | 1953 | E |
| 3893 | 1953 | E |
| 4253 | 1953 | E |
| 5535 | 1955 | F |
| 15. USMC Fibre Fastening B | | |
| 120 | 1952 | B |
| 296 | 1953 | E |
| 355 | 1953 | E |
| 356 | 1952 | B |
| 362 | 1948 | E |
| 618 | 1949 | B |
| 882 | 1952 | B |

| Machine Type and Serial Number | Year Returned or Transferred | Reason for Return or Transfer |
|---|---|---|
| 16. USMC Lacing A | | |
| 9 | 1949 | B |
| 303 | 1955 | F |
| 17. Economy Insole Channeling B | | |
| 178 | 1954 | E |
| 225 | 1952 | E |
| 475 | 1954 | G |
| 579 | 1954 | E |
| 1700 | 1955 | F |
| 18. Insole Rib Reinforcing B | | |
| 294 | 1952 | E |
| 19. USMC Upper Trimming J | | |
| 319 | 1954 | G |
| 447 | 1952 | B |
| 20. Loose Nailing 2 | | |
| 416 | 1951 | D |
| 2642 | 1952 | B |
| 2677 | 1952 | B |
| 2681 | 1955 | F |
| 2694 | 1953 | B |
| 21. Universal Slugging | | |
| 1863 | 1952 | B |
| 5878 | 1953 | E |
| 5980 | 1953 | E |
| 6165 | 1953 | E |
| 6607 | 1955 | F |
| 22. Power Welt Tacking | | |
| 4551 | 1953 | B |
| 23. Ultima Heel Trimming | | |
| 1676 | 1951 | G |
| 2039 | 1951 | G |
| 2306 | 1951 | G |
| 2307 | 1951 | G |
| 2420 | 1951 | G |
| 3184 | 1952 | B |

| Machine Type and Serial Number | Year Returned or Transferred | Reason for Return or Transfer |
|---|---|---|
| 24. Goodyear Rapid Bobbin Winding | | |
| 694 | 1952 | E |
| 1366 | 1952 | E |
| 4044 | 1952 | B |
| 25. Goodyear Welt Beating and Slashing | | |
| 67 | 1952 | B |
| 872 | 1952 | E |
| 1136 | 1954 | B |
| 2011 | 1952 | E |
| 2018 | 1954 | B |
| 26. Goodyear Impression Stitch Burnishing 2 | | |
| 1326 | 1952 | B |
| 27. (a) Goodyear Improved Sole Laying E | | |
| 367 | 1948 | A |
| 368 | 1951 | G |
| 369 | 1948 | A |
| 460 | 1951 | G |
| 1386 | 1952 | B |
| (b) Goodyear Improved Sole Laying F | | |
| 168 | 1951 | G |
| 183 | 1951 | G |
| 560 | 1952 | G |
| 662 | 1951 | G |
| 663 | 1952 | B |
| 702 | 1951 | G |
| (c) Goodyear Sole Laying A | | |
| 28. Goodyear Stitch Separating B | | |
| 99 | 1948 | E |
| 29. Goodyear Welt Indenting and Burnishing | | |
| 1214 | 1950 | B |
| 2104 | 1952 | B |



73-8

| Machine Type and Serial Number | Year Returned or Transferred | Reason for Return or Transfer |
|---|---|---|
| 30. Goodyear Upper Stapling B | | |
| 1524 | 1949 | B |
| 1528 | 1954 | E |
| 1553 | 1949 | B |
| 1667 | 1952 | B |
| 31. Goodyear Welt Butting and Tacking | | |
| 170 | 1948 | A |
| 291 | 1952 | E |
| 315 | 1950 | A |
| 1135 | 1952 | B |
| 32. Goodyear Jointing D | | |
| 33. Economy Insole Lip Cementing C | | |
| 55 | 1952 | E |
| 34. Economy Insole Lip Setting B | | |
| 64 | 1952 | E |
| 35. Economy Insole Reinforcing C | | |
| 71 | 1948 | A |
| 386 | 1948 | A |
| 36. USMC Lasting 7 | | |
| 922 | 1949 | A |
| 1146 | 1949 | A |
| 1383 | 1947 | B |
| 1552 | 1947 | B |
| 1565 | 1948 | A |
| 1919 | 1948 | A |
| 1941 | 1947 | B |
| 1975 | 1948 | A |
| 3392 | 1948 | A |
| 3358 | 1948 | A |
| 3777 | 1948 | A |
| 3780 | 1950 | B |
| 3789 | 1948 | A |
| 3792 | 1948 | A |
| 3793 | 1950 | B |
| 4366 | 1949 | A |



73-9

| Machine Type and Serial Number | Year Returned or Transferred | Reason for Return or Transfer |
|---|---|---|
| 36. USMC Lasting 7 (cont.) | | |
| 4368 | 1949 | A |
| 5435 | 1949 | A |
| 5799 | 1947 | B |
| 5819 | 1948 | A |
| 6005 | 1948 | A |
| 6308 | 1949 | A |
| 6040 | 1948 | A |
| 6224 | 1949 | A |
| 6351 | 1948 | A |
| 37. (a) USMC Insole Tacking 1 | | |
| 1214 | 1952 | B |
| 2849 | 1955 | B |
| 2967 | 1952 | B |
| 3204 | 1952 | H |
| 3232 | 1954 | B |
| 3536 | 1952 | B |
| 3931 | 1952 | B |
| (b) USMC Insole Tacking 3 | | |
| 327 | 1952 | B |
| 38. (a) USMC Eyeletting C | | |
| 188 | 1954 | E |
| 223 | 1953 | E |
| 413 | 1953 | E |
| 419 | 1949 | B |
| 420 | 1949 | B |
| 422 | 1953 | E |
| 451 | 1951 | E |
| 587 | 1948 | B |
| 1936 | 1948 | B |
| 3140 | 1955 | F |
| 3604 | | |
| (b) Duplex Eyeletting | | |
| 476 | 1948 | A |
| 608 | 1949 | B |
| 1927 | 1952 | B |
| 2293 | 1949 | A |



73-10

| Machine Type and Serial Number | Year Returned or Transferred | Reason for Return or Transfer |
|---|---|---|
| 38. (cont.) | | |
| (c) Duplex Eyeletting B | | |
| 822 | 1955 | F |
| 39. (a) USMC Edging | | |
| (b) USMC Edging B | | |
| 143 | 1948 | E |
| 341 | 1950 | B |
| 40. USMC Tip Finishing A | | |
| 114 | 1950 | B |
| 41. Ensign Lacing B | | |
| 2972 | 1951 | A |
| 42. USMC Splitting G | | |
| 43. Grip Tacking B | | |
| 2127 | 1947 | D |
| 44. Staple Fastening D | | |
| 45. USMC Wiring E | | |
| 46. (a) Xpedite Finishing D | | |
| (b) Xpedite Finishing E | | |
| 167 | 1950 | G |
| 168 | 1950 | G |
| 169 | 1950 | G |
| 171 | 1950 | G |
| 172 | 1952 | G |
| 173 | 1950 | G |
| 368 | 1952 | B |

| Machine Type and Serial Number | Year Returned or Transferred | Reason for Return or Transfer |
|---|---|---|
| 47. Heel Breast Scouring and Aligning A | | |
| 48. Planet Sole Rounding E | | |
| 346 | 1952 | B |
| 49. Edge Setting and Wheeling A | | |
| 2963 | 1950 | B |
| 50. Ideal Twin Clicking G | | |
| 51. Goodyear Welt Indenting C | | |
| 33 | 1955 | B |
| 52. USMC Sewed Seat Lasting A | | |
| 9 | 1953 | B |
| 53. USMC Stitchdown Thread Lasting B | | |
| 894 | 1951 | B |
| 54. Rex Rotary Pounding and Trimming B | | |
| 3534 | 1952 | B |
| 55. USMC Celastic Conditioning | | |
| 1379 | 1948 | B |
| 1498 | 1954 | B |
| 1667 | 1954 | G |
| 1968 | 1954 | G |
| 1977 | 1948 | B |
| 2056 | 1954 | G |
| 2059 | 1955 | G |
| 56. Goodyear Automatic Bobbin Winding A | | |
| 33 | 1952 | B |
| 57. USMC Eyelet Stay Cementing and Applying A | | |
| 7 | 1952 | C |
| 58. USMC Sole Stitching C | | |
| 1238 | 1951 | B |



73-12

| Machine Type and Serial Number | Year Returned or Transferred | Reason for Return or Transfer |
|---|---|---|
| 59. Naumkeag Buffing | | |
| 3045 | 1946 | B |
| 5607 | 1950 | B |
| 60. Jointing G | | |
| 128 | 1948 | B |
| 188 | 1954 | B |
| 191 | 1948 | B |
| 656 | 1951 | B |
| 61. Goodyear Outsole Stitching A | | |
| 4 | 1951 | C |
| 62. Insole Rib Cementing A | | |
| 154 | 1952 | B |

B. OPTIONAL TERMS MACHINES

| | | |
|---|---|---|
| 63. USMC Shank Reducing A | | |
| 53 | 1946 | B |
| 439 | 1950 | B |
| 64. Pluma Skiving H | | |
| 950 | 1954 | B |
| 1045 | 1955 | G |
| 1076 | 1948 | B |
| 65. USMC Last Pulling B | | |
| 675 | 1947 | B |
| 683 | 1947 | B |
| 690 | 1947 | B |
| 66. Rapid Folding H | | |
| 2950 | 1953 | E |
| 3236 | 1953 | E |
| 3514 | 1953 | A |
| 3516 | 1953 | A |
| 3517 | 1949 | B |
| 3518 | 1949 | B |
| 3714 | 1953 | A |
| 3749 | 153 | A |

| Machine Type and Serial Number | Year Returned or Transferred | Reason for Return or Transfer |
|---|---|---|
| 66. Rapid Folding H (cont.) | | |
| 3811 | 1953 | E |
| 3845 | 1953 | E |
| 3860 | 1949 | B |
| 3965 | 1949 | B |
| 3966 | 1953 | E |
| 3970 | 1953 | A |
| 3971 | 1953 | B |
| 3993 | 1953 | B |
| 4005 | 1949 | B |
| 67. USMC Cementing C | | |
| 1702 | 1949 | B |
| 2002 | 1949 | B |
| 2078 | 1949 | B |
| 68. USMC Skiving A | | |
| 441 | 1949 | B |
| 442 | 1949 | B |
| 775 | 1949 | B |
| 69. USMC Embossing G | | |
| 40 | 1949 | B |
| 77 | 1952 | B |
| 70. USMC Splitting A | | |
| 866 | 1949 | B |
| 71. Crest Heel Blacking C | | |
| 96 | 1953 | E |
| 97 | 1953 | E |
| 156 | 1953 | E |
| 157 | 1953 | E |
| 485 | 1949 | B |
| 72. USMC Twin Edge Setting F | | |
| 2 | 1955 | E |
| 305 | 1950 | B |
| 311 | 1950 | B |
| 312 | 1950 | B |



7,3-14

| Machine Type and Serial Number | Year Returned or Transferred | Reason for Return or Transfer |
|---|---|---|
| 73. USMC Sole Edge Inking A | | |
| 248 | 1950 | C |
| 310 | 1950 | C |
| 74. USMC Sole Cementing C | | |
| 78 | 1952 | B |
| 105 | 1952 | B |
| 108 | 1952 | B |
| 75. Shank Piece Sticking B | | |
| 540 | 1952 | B |
| 569 | 1952 | B |
| 76. Regent Stamping C | | |
| 1639 | 1952 | B |
| 77. Insole Rib Cementing A | | |
| 154 | 1952 | B |
| 78. USMC Channel Cementing A | | |
| 947 | 1952 | B |
| 79. USMC Edge Trimming H | | |
| 911 | 1954 | B |
| 1155 | 1952 | B |
| 1156 | 1954 | B |
| 1157 | 1952 | B |
| 1158 | 1952 | B |
| 80. USMC Pasting E | | |
| 2573 | 1952 | E |
| 2574 | 1952 | E |
| 2593 | 1952 | E |
| 2596 | 1952 | E |
| 2597 | 1952 | E |
| 2598 | 1952 | E |
| 2599 | 1952 | E |
| 2600 | 1952 | E |
| 2681 | 1952 | B |
| 3308 | 1952 | E |
| 3681 | 1952 | B |



73-15

| | Machine Type and Serial Number | Year Returned or Transferred | Reason for Return or Transfer |
|---|---|---|---|
| 81. | Heel-Breast Scouring N | | |
| | 704 | 1952 | B |
| 82. | Heel Scouring R | | |
| | 4353 | 1952 | B |
| | 4859 | 1952 | B |
| | 4880 | 1952 | B |
| 83. | USMC Thermo-Cementing and Folding B | | |
| | 21 | 1954 | C |
| 84. | USMC Inseam Cementing A | | |
| | 268 | 1954 | B |
| 85. | USMC Twin Edge Setting D | | |
| | 33 | 1951 | G |
| | 252 | 1951 | G |
| | 605 | 1952 | B |
| | 606 | 1955 | A |
| | 607 | 1955 | A |
| | 629 | 1955 | A |
| | 630 | 1955 | A |
| | 631 | 1955 | A |
| 86. | Pluma Skiving O | | |
| | 51 | 1955 | G |
| | 71 | 1955 | F |
| | 106 | 1955 | F |
| 87. | Insole Lip Cutting and Scoring D | | |
| | 1216 | 1951 | A |
| 88. | USMC Upper Reinforcing A | | |
| | 6 | 1951 | C |
| 89. | USMC Cementing F | | |
| | 18 | 1951 | G |
| 90. | Insole Lip Cutting and Scoring E | | |
| | 415 | 1951 | B |
| 91. | USMC Heel Scouring A | | |
| | 7 | 1951 | C |



73-16

| | Machine Type and Serial Number | Year Returned or Transferred | Reason for Return or Transfer |
|---|---|---|---|
| 92. | Insole Tack Cutting A | | |
| | 212 | 1952 | C |
| 93. | USMC Seam Reducing A | | |
| | 21 | 1954 | H |
| 94. | Goodyear Insole Spotting and Pressing A | | |
| | 10 | 1955 | H |
| 95. | Goodyear Insole Rounding and Trimming A | | |
| | 10 | 1955 | H |
| 96. | Goodyear Insole Rib Tucking A | | |
| | 14 | 1955 | H |
| 97. | USMC Edge Trimming L | | |
| | 287 | 1955 | F |
| | 755 | 1955 | F |



73-17

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IN THE

# Supreme Court of the United States

**OCTOBER TERM, 1967**

No. 335

THE HANOVER SHOE, INC.,
*Petitioner,*

*v.*

UNITED SHOE MACHINERY CORPORATION,
*Respondent.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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# INDEX


| | PAGE |
|---|---|
| Opinions Below | 1 |
| Jurisdiction | 2 |
| Questions Presented | 2 |
| Statutes Involved | 3 |
| Statement of the Case | 4 |
| The Reasons for Granting the Writ | 9 |
| As to the tax error | 9 |
| As to the error fixing a cut off date for damages other than the applicable statute of limitations | 14 |
| Conclusion | 18 |


## TABLE OF CASES


*A. C. Becken Co.* v. *Gemex Corp.*, 1961 Trade Cases ¶70,118 (N.D. Ill. 1966), aff'd. 314 F. 2d 839 (7th Cir. 1963), *cert. denied*, 375 U. S. 816 (1963) ..... 12fn

*American Tobacco Co.* v. *United States*, 328 U. S. 781 (1946) ..... 3, 7, 8, 14, 15, 16, 18

*Charles Rubenstein, Inc.* v. *Columbia Pictures Corp.*, 176 F. Supp. 527 (D.C. Minn. 1959), aff'd., 289 F. 2d 418 (8th Cir. 1961) ..... 12fn

*Commissioner of Internal Revenue* v. *Glenshaw Glass Co.*, 348 U. S. 426 (1955) ..... 3, 6, 9, 10, 11, 12, 13

*The Hanover Shoe, Inc.* v. *United Shoe Machinery Corporation*, 185 F. Supp. 826 (M.D. Pa. 1960), aff'd., 281 F. 2d 481 (3d Cir. 1960), *cert. denied*, 364 U. S. 901 (1960) ..... 13

PAGE

*North Texas Producers Assn.* v. *Metzger Dairies*, 348 F. 2d 189 (5th Cir. 1965), *cert. denied*, 382 U. S. 977 (1966) ..... 12fn

*Sterling Nelson & Sons, Inc.* v. *Rangen, Inc.*, 235 F. Supp. 393 (D.C. Idaho 1964), aff'd., 351 F. 2d 851 (9th Cir. 1965), *cert. denied*, 383 U. S. 936 (1966) ..... 12fn

*Straus* v. *Victor Talking Machine Co.*, 297 Fed. 791 (2d Cir. 1924) ..... 11fn

*Union Carbide and Carbon Corp.* v. *Nisley*, 300 F. 2d 561 (10th Cir. 1961), *appeal dismissed*, 371 U. S. 801 (1962) ..... 12fn

*United Shoe Machinery Corporation* v. *United States*, 258 U. S. 451 (1922) ..... 17fn

*United States* v. *United Shoe Machinery Corporation*, 110 F. Supp. 295, *affirmed, per curiam*, 347 U. S. 521 (1954) ..... 6

*United States* v. *United Shoe Machinery Co.*, 247 U. S. 32 (1918) ..... 17fn

*United States* v. *Winslow*, 227 U. S. 202 (1913) ..... 17fn

**Statutes:**

Clayton Act (38 Stat. 731, 15 U.S.C.A. §15):

Section 4 ..... 3

Clayton Act (38 Stat. 731; 69 Stat. 283; 15 U.S.C.A. §16a):

Section 5a ..... 3, 7

Sherman Act (26 Stat. 209; 69 Stat. 282; 15 U.S.C.A. §2):

Section 2 ..... 3, 6, 7, 14, 17

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1967

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No.

---

THE HANOVER SHOE, INC.,

*Petitioner,*

*v.*

UNITED SHOE MACHINERY CORPORATION,

*Respondent.*

---

Petitioner prays that a writ of certiorari issue to review the amended judgment of the United States Court of Appeals for the Third Circuit entered in the above entitled case on June 7, 1967.

## Opinions Below

The Findings of Fact, Conclusions of Law and Opinion of the District Court for the Middle District of Pennsylvania are printed, R. 720a-800a,* and reported 245 F. Supp. 258-299. The Supplemental and Amended Findings of Fact, Conclusions of Law and Opinion as

* References to the Record in the District Court are to pages of Petitioner's and Respondent's separate appendices in the Court of Appeals and are preceded by the letter "R" and followed by the letter "a" in the case of Respondent's Appendix and the letter "b" in the case of Petitioner's Appendix. References to the Appendices hereto are preceded by the designation "Appendix" or "App.".

Amended are printed, R. 855a-871a, and reported 245 F. Supp. 299-308. The opinion of the Court of Appeals is printed in Appendix A hereto, 1a-33a. The supplemental opinion following denial of rehearing and the Court's *per curiam* decision denying rehearing are printed in Appendix A, 34a-38a. The opinion and supplemental opinion of the Court of Appeals are not yet officially reported.

## Jurisdiction

The Judgment and Order of the Court of Appeals was entered on April 11, 1967. An Order Amending Judgment and the Amended Judgment of the Court entered on June 7, 1967 are printed in Appendix B, 1b-3b. The order of the Court of Appeals denying rehearing was entered May 18, 1967, and is printed in Appendix B, 4b-5b. The jurisdiction of the Court is invoked under 28 U.S.C. Section 1254(1).

## Questions Presented

The questions presented arise in an action for treble damages for violation of the antitrust laws in which plaintiff below, The Hanover Shoe, Inc. (hereinafter Hanover) brought an action against defendant, United Shoe Machinery Corporation (hereinafter United) to recover damages for injuries from monopolization by United of trade in shoe machinery in violation of Section 2 of the Sherman Act.

The first question presented is whether the party damaged is required to reduce its damage calculations by whatever tax benefits it may have enjoyed as a result of leasing shoe machinery as compared with its tax situation had it been able to buy shoe machinery when, under

the decision of this Court in *Commissioner of Internal Revenue* v. *Glenshaw Glass Co.*, 348 U. S. 426 (1955), Hanover will be subject to tax on the full trebled amount of its recovery.

The second question presented is whether on the record in this case United monopolized the shoe machinery trade in violation of Section 2 of the Sherman Act during the full period of the applicable statute of limitations, i.e. from July 1, 1939 through September 21, 1955, or whether the decision of this Court in *American Tobacco Co.* v. *United States*, 328 U. S. 781 on June 10, 1946 requires that the conduct of United be held to have been lawful prior to that date and unlawful after that date so that Hanover may not, as a matter of law, recover damages for conduct of United prior to that date, although it may for the same conduct thereafter, the reason being that the decision of this Court in *American Tobacco* may be given only prospective and not retrospective application in so far as it may be applicable to the conduct of United.

## Statutes Involved

The statutory provisions involved are Section 4 of the Clayton Act (38 Stat. 731; 15 U.S.C.A. §15), Section 5a of the Clayton Act (38 Stat. 731; 69 Stat. 283; 15 U.S.C.A. §16a) and Section 2 of the Sherman Act (26 Stat. 209; 69 Stat. 282; 15 U.S.C.A. §2). These statutes are printed in Appendix C hereto.

## Statement of the Case

This is an action by petitioner, Hanover, against United to recover treble damages for violation of Section 2 of the Sherman Act through alleged monopolization of the shoe machinery industry and alleged monopolistic practices with respect to substantially all shoe machinery required and used by Hanover, a manufacturer of men's welt shoes.

After trial before the District Court without a jury the Court concluded that United had violated Section 2 of the Sherman Act in that, among other matters, United made its principal shoe machinery available to shoe manufacturer customers only on lease and that as a result of the unlawful monopolization Hanover was required to pay more for leasing the shoe machinery it needed and used than it would have been required to pay had it been able to buy machinery in a free and competitive market and that Hanover was injured and sustained damage thereby (R. 799a-800a). The District Court fixed the period of time for which Hanover might recover damages as July 1, 1939 through September 21, 1955 (R. 800a). There is no dispute as to the applicable Pennsylvania statute of limitations and the effect of the tolling provisions to extend it to the period stated (R. 790a, fn. 15; App. pp. 26a-27a). The District Court fixed the amount of Hanover's damage during this period of some 16 years as $1,413,203 (R. 859a) and entered judgment for $4,239,609 after trebling (R. 873a).

On appeal by United, the Court of Appeals vacated the judgment of the District Court as to damages and awarded a new trial limited to damages in accordance with the opinion of the Court (App. p. 33a).

The Court of Appeals held that the District Court had committed error:

A. In failing to reduce the amount of the damages by the amount of the tax advantages that had accrued to Hanover during the damage period by reason of leasing its shoe machinery from United rather than owning it.

The Court of Appeals accepted the theory of damages of Hanover which was that United's unlawful monopolization of the shoe machinery industry and United's policy of only leasing all machinery required by Hanover injured Hanover in that "Hanover was required to pay more on the leases for the use of its shoe machinery than it would have been required to pay if the machinery had been available for sale in a free and competitive market" (App. p. 27a). Leasing was the only way United's principal machines were made available to Hanover.

Hanover's damage claim is thus based on the injury done to it throughout the damage period by reason of having to "pay more on the leases" from the monopolist than if it had been able to buy and own its machines in an open competitive market.

The decision of the Court of Appeals requires a recomputation of the damages and for this purpose the judgment of the District Court was vacated and a new trial ordered to permit "United to show the favorable tax consequences which Hanover obtained from leasing and the unfavorable consequences which would have flowed from ownership of the machinery" (App. p. 31a).

The reasoning of the Court of Appeals was that the damage calculation must be adjusted to take account of "the tax elements which would bear on Hanover's choice of purchasing rather than leasing the machinery it required" (App. p. 30a). This assumes, contrary to fact, that Hanover had a choice between leasing and purchasing. It had no such choice. The Court added that "• • •

the award of damages should not exceed the difference between the two alternatives as Hanover itself would have computed it" (*id.*)—after tax. Of course, any such computation by Hanover would not reflect the effect of a second tax imposed upon a judgment that might be obtained in the future. If the alternatives referred to by the court had actually existed, there would have been no violation of law and, hence, no question of a later judgment subject to tax.

The District Court correctly recognized that, under *Glenshaw Glass, supra,* Hanover would be subject to tax on the entire amount of any recovery, R. 785a, and held that "The tax consequences are extraneous to the damage caused by United, and are not a part of the calculation" (R. 786a).

B. The Court of Appeals further held that the District Court had committed error in finding monopolization by United in violation of Section 2 of the Sherman Act during the full period within the statute of limitations, i.e. from July 1, 1939 through September 21, 1955.

An important item of proof in support of Hanover's claim of such monopolization was the final decree in *United States* v. *United Shoe Machinery Corporation,* 110 F. Supp. 295, *affirmed, per curiam,* 347 U. S. 521 (1954), (hereinafter the Government case), an action in which United was found to have violated Section 2 of the Sherman Act by monopolizing the shoe machinery trade and commerce among the several states. This Court, in affirming, *per curiam,* the judgment of the District Court, stated that it did so "being satisfied that the findings are justified by the evidence and support the decree," (347 U. S. at p. 521). This final decree, with its adjudication that United had violated Section 2 of the Sherman Act by monopolizing

the shoe machinery trade, was offered and received in evidence under Section 5a of the Clayton Act (15 U.S.C.A. §16a) as prima facie evidence of the alleged violation.

The Court of Appeals found that the decision in the Government case "demonstrates that the lease-only system itself was adjudicated in the Government case to be a means of monopolization," (App. p. 19a) and that Hanover was entitled to the benefit of this determination in the present action. The Court of Appeals correctly rejected United's contention that the adjudication of monopolization in the Government case operated only prospectively from the date of the decree therein and had no retrospective effect (App. p. 20a) but it then proceeded to hold that retroactivity did not extend to the beginning of the statutory period of limitation on July 1, 1939 but must be cut off on June 10, 1946 (App. pp. 24a-25a). The result of this decision was to require a recomputation of damages limited to the period after this newly-fixed date. The judgment below was, therefore, vacated and a new trial ordered limited to the recomputation of damages in accordance with the opinion of the Court.

The reasoning of the Court of Appeals in fixing a cut off date on June 10, 1946 was that this was the date of the decision of this Court in *American Tobacco Co.* v. *United States, supra;* that prior to that date a necessary element in a violation of Section 2 of the Sherman Act was proof of predatory practices; that in the Government case the District Court had found an absence of predatory practices by United; that it followed that United had not violated Section 2 of the Sherman Act prior to June 10, 1946 and that it also followed that, absent a violation of law during the period prior to June 10, 1946, Hanover might not recover damages for acts of United prior to that date.

As a part of this line of reasoning the Court of Appeals accepted the decision of the District Court in the Government case that United was guilty of monopolization but only after June 10, 1946 under the rule announced in the *American Tobacco* decision, *supra*, and held that the decision in the Government case could not be given any further retroactive effect. The Court of Appeals observed that the retroactive effect to be given to a decision of a court "should be determined from the circumstances of the particular case, having in mind the purpose which the new rule of law [that of the *American Tobacco* decision] seeks to accomplish and the practical weighing of the comparative benefits and evils of retroactivity" (App. p. 23a). It was concluded that it was unjust to impose "the penalty of treble damages" retroactively (*id.*). The Court of Appeals then referred to the fact that United had been involved in antitrust litigation that reached this Court on three occasions prior to the loss of the Government case and that these earlier decisions gave United's counsel grounds for belief that its lease-only policy stood under "the shelter of Supreme Court approval" (App. p. 22a) until the change of law occurred on June 10, 1946 and that, as a consequence, United might carry on its practices in reliance upon those earlier decisions until June 10, 1946 when the *American Tobacco* decision presumably provided fair warning that all might not be well for United on the antitrust front.

The point stated above was neither briefed nor argued before the District Court or the Court of Appeals. The District Court correctly concluded that the proof before it showed a violation of the antitrust law by United throughout the period of limitations. The Court of Appeals, we submit, erred in vacating the judgment of the District Court on this point.

## The Reasons for Granting the Writ

**As to the tax error:**

1. The Court of Appeals erred in failing to give effect to the decision of this Court in *Commissioner of Internal Revenue* v. *Glenshaw Glass Co., supra,* under which Hanover will be subject to income tax on the full trebled amount of its recovery. Instead, the Court of Appeals required Hanover to deduct from its computation of damages the difference between the tax consequences to it of leasing machinery from the wrongdoer and ownership in a free and open market during the damage period. The result of this decision is to benefit the wrongdoer at the expense of Hanover. This benefit flows from the fact that the victim of the wrongdoing is required to give effect to tax consequences twice—once in the calculation of damages and again when, under the *Glenshaw Glass* decision, taxes are paid on the recovery remaining after deducting taxes.

The consequence of this decision is illustrated by the following example:

All figures are assumed:

| | Assuming Machinery is Leased | Assuming Machinery is Owned |
|---|---|---|
| Annual gross revenues | $2,000 | $2,000 |
| Less annual tax-deductible lease charges | 1,000 | |
| Less annual tax-deductible depreciation | | 400 |
| Net income before taxes | $1,000 | $1,600 |
| Net income after taxes at assumed rate of 50% | $ 500 | $ 800 |

Hanover claims as its damage and the District Court awarded to it damages based upon the difference between the leasing and ownership costs before taxes, which is $600. After tax has been paid on this recovery under the *Glenshaw Glass* decision, the after tax recovery will be $300.

Under the decision of the Court of Appeals, however, Hanover will be entitled to recover as damages only $300 which is the difference between the after tax ownership cost of $800 and after tax lease cost of $500. Hanover will then pay a tax on this recovery under the *Glenshaw Glass* decision and its after tax recovery will then be $150. This, we submit, is clearly at odds with Section 4 of the Clayton Act which provides that a plaintiff is entitled to recover the damages it sustains and to have such damages trebled by the court. The introduction of tax consequences into the damage calculation in the decision of the Court of Appeals is beneficial only to the wrongdoer and prejudicial only to the victim.

2. The decision of the Court of Appeals, if it stands, will introduce a novel and unjust result into all treble damage actions with the result that the important part that treble damage actions play in the enforcement of the antitrust laws will be seriously impaired to the benefit of the wrongdoers. The question presented is, therefore, one of public importance in the enforcement of the antitrust laws.

3. The decision of the Court of Appeals below reducing the actual damages sustained by defendant by a double application of federal income taxes is, so far as we have been able to determine, wholly novel. It is contrary to findings of damage by other circuits which, both before

and after *Glenshaw Glass*, have uniformly omitted tax consequences in determining damages.*

---

* *2d Circuit:* *Straus* v. *Victor Talking Machine Co.*, 297 Fed. 791 (2d Cir. 1924) (Action under Section 7 of the Sherman Act and Section 4 of the Clayton Act holding that plaintiffs' damages are the difference between what the Macy partners paid for defendant's merchandise and the price they would have paid in a free and open market. There is no clearer statement of the law as it existed until the decision by the 3rd Circuit below than appears in this case:

"They contended for a rule of damage which seeks the proximate cause of damage and the proximate result occasioned by that cause. In a case just decided, dealing with an entirely different question, Mr. Justice Holmes has used a terse phrase here applicable:

'On the other hand, the common understanding is that in construing these policies we are not to take broad views, but generally are to stop our inquiries with the cause nearest to the loss.' Queen Insurance Co. of America v. Globe & Rutgers Fire Insurance Co., 44 Sup. Ct. 175, 68 L. Ed. , decided January 7, 1924.'

"And in Southern Pac. Co. v. Darnell-Taenzer Lumber Co., 245 U. S. 531, 533, 38 Sup. Ct. 186, 62 L. Ed. 451, the same Justice said:

'The general tendency of the law, in regard to damages, at least, is not to go beyond the first step.'

"Here the defendants themselves adduced testimony that the price charged by distributors to dealers under the price schedule of Victor Company was reasonable. The jury must have so found. Plaintiffs were compelled to pay more than this reasonable price. Why? Manifestly because the illegal combination forced them so to do in order to carry on the requirements of their business. Whether, then, plaintiffs sold to their customers at a profit or loss becomes immaterial in this case. They were entitled to goods at the reasonable price thereof. Through no legal fault of theirs, but because of defendants' wrong, they were deprived of their right, and the jury could find that such deprivation defined in money was the difference between the established reasonable price and the amounts plaintiffs were compelled to pay, provided as the trial judge charged, "they acted reasonably in making these payments." Thomsen v. Cayser, 243 U. S. 66, 37 Sup. Ct. 353, 61 L. Ed. 597, Ann. Cas. 1917D, 322; also see 166 Fed. 251, 253, 92 C.C.A. 315; Chattanooga Foundry & Pipe Works v. City of Atlanta, 203 U. S. 390, 27 Sup. Ct. 65, 51 L. Ed. 241; Montague v. Lowry, 193 U S. 38, 24 Sup. Ct.

This Court should grant review of this issue since the decision of the Court of Appeals on the question of the applicability of income taxes in the computation of damages has created a difference between circuits on this issue. The question is one which this Court should settle.

4. The important question of federal law here presented is one that has not been but should be settled by this Court. The decision of this Court in the *Glenshaw Glass* case settled the question as to the taxability of the recovery in a treble damage action. The question

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307, 48 L. Ed. 608. It is thus unnecessary to 'go beyond' this first step." (297 Fed. at p. 803.)

*5th Circuit.* *North Texas Producers Assn.* v. *Metzger Dairies*, 348 F. 2d 189 (5th Cir. 1965), *cert. denied*, 382 U. S. 977 (1966). (Action under Section 2 of the Sherman Act. Approximately 60% of the total damages of $606,000 was assessed as the increased cost of obtaining monopolized product.)

*7th Circuit.* *A. C. Becken Co.* v. *Gemex Corp.*, 1961 Trade Cases ¶70,118 (N.D. Ill. 1961), *affd.* 314 F. 2d 839 (7th Cir. 1963), *cert. denied*, 375 U. S. 816 (1963). (Action under Section 1 of the Sherman Act; damages assessed at the amount of gross profits on sales less additional salesmen's commissions.)

*8th Circuit.* *Charles Rubenstein, Inc.* v. *Columbia Pictures Corp.*, 176 F. Supp. 527 (D. C. Minn. 1959), *affd.*, 289 F. 2d 418 (8th Cir. 1961). (Action under Sections 1 and 2 of the Sherman Act; damages computed on the basis of gross receipts minus a percentage of film rentals and plaintiff was awarded the difference in the net gross box office return which would have been achieved as compared with actual net gross box office return.)

*9th Circuit.* *Sterling Nelson & Sons, Inc.* v. *Rangen, Inc.*, 235 F. Supp. 393 (D. C. Idaho 1964), *affd.*, 351 F. 2d 851 (9th Cir. 1965), *cert. denied*, 383 U. S. 936 (1966). (Action under Section 3c of the Clayton Act relating to commercial bribery and rebates. Damages found to be an estimated profit of 15% on anticipated sales.)

*10th Circuit.* *Union Carbide and Carbon Corp.* v. *Nisley*, 300 F. 2d 561 (10th Cir. 1961), *appeal dismissed*, 371 U. S. 801 (1962). (Action under Sections 1 and 2 of the Sherman Act. Damages computed as the difference between price paid to plaintiff for ore and price plaintiff would have received but for defendant's antitrust violation.)

here presented is the counterpart of the question in that case and it should be reviewed and settled by this Court so that the tax consequences to a victim during the damage period will be known and understood. This is, we repeat, a matter of continuing importance in all treble damage actions as well as a matter of public importance in the enforcement of the antitrust laws. Unless this point is reviewed and settled, the important effect of the decision of this Court in the *Glenshaw Glass* case will be lost in that, if in addition to the tax on the recovery, the victim is required to deduct taxes from his damage calculation the result will necessarily be a double tax and the fair result reached in the *Glenshaw Glass* case will be seriously whittled away and undermined, if not largely destroyed, the only beneficiary being the wrongdoer.

5. The view taken by the District Court was that tax consequences are not a part of the damage calculation (R. 786a). This decision was correct and was in accord with the rule of law that in tort and breach of contract cases taxes are not considered in assessing damages (R. 785a). This decision is also in accord with the decision of the late Judge Goodrich on the separate trial of the defense of United that Hanover had not been damaged because Hanover had passed on its loss to its customers in the sale of shoes. The District Court rejected this defense, *The Hanover Shoe, Inc.* v. *United Shoe Machinery Corporation,* 185 F. Supp. 826 (M.D. Pa. 1960), *aff'd,* 281 F. 2d 481 (3d Cir. 1960), *cert. denied,* 364 U. S. 901 (1960) and stated "The plaintiff's injury occurred when it was charged too much for the machinery", and added:

> "If it had not thus been illegally charged for machinery it would have had more money to pay

> out in dividends, or to engage in a further development campaign to sell its shoes, or to raise the wages of its employees, or to enlarge its bank account as protection against a rainy day, or for all of these things. The plaintiff against whom a tort is committed has his cause of action at the moment that the tort occurs. Of course, he is subject to the rule of avoidable consequences and cannot sit still and let damages pile up when reasonable steps would have prevented further consequential damages. But that is the extent of his obligation." 185 F. Supp. at 829.

Judge Goodrich's decision supports the correct rule that tax consequences have no part in the damage calculation. It was error of the Court of Appeals to require that they be considered.

**As to the error fixing a cut off date for damages other than the applicable statute of limitations.**

1. The Court of Appeals construed the decision of this Court in *American Tobacco Co.* v. *United States,* 328 U. S. 781, decided June 10, 1946, as working such a change in the statutory offense of monopolization in violation of Section 2 of the Sherman Act that defendant United was to be treated as not having violated Section 2 prior to the date of that decision, even though United had been found to have violated Section 2 in the Government case in a decision that became final in the *per curiam* decision of this Court on May 17, 1954 and even though the final decree in the Government case was received in evidence at the trial below as prima facie evidence of monopolization and said final decree adjudicated the violation of Section 2 by United without any limitation as to time or any declaration that either the

adjudication of violation or the remedial provisions of the final decree were to be given only prospective effect or were to be limited in any way. This Court in affirming the adjudication of monopolization in the final decree in the Government case stated that this Court was "satisfied that the findings are justified by the evidence and support the decree." 347 U. S. 521 (1954).

We submit that review by this Court is required to determine whether the decision of this Court in *American Tobacco* made such a change in the statutory offense of monopolization in violation of Section 2 of the Sherman Act that United's continuing offense of monopolization, as charged in the instant case and as charged and adjudicated in the Government case, is to be treated in a treble damage action as having arisen only after the date of the decision of this Court in *American Tobacco.*

We submit, further, that review by this Court is required to determine whether this Court's affirmance, *per curiam,* of the decision of the District Court in the Government case is to be treated in a treble damage action as an adjudication of monopolization that is to be given only limited effect in retroactive application. Only this Court may make such a determination.

We submit that the Court of Appeals erroneously misconstrued the decision of this Court in *American Tobacco* when it gave it only prospective effect so that, as a consequence, although United's monopolistic acts were the same both before and after the date of that decision, they were to be treated as lawful before and unlawful after it. The Court of Appeals also erred in failing to give full retroactive effect to the adjudication of monopolization by this Court in the Government case.

2. The decision of the Court of Appeals has introduced into our antitrust law the concept that the retro-

active effect to be given to a decision of a court in an antitrust case is to be determined from "the circumstances of the particular case, having in mind the purpose which the new rule of law seeks to accomplish and the practical weighing of the comparative benefits and evils of retroactivity" (App. p. 23a).

We ask this Court to review this decision because the foregoing rule was stated with reference to the decision of this Court in *American Tobacco* and only this Court is in a position to decide whether "a new rule of law" was announced in that decision and what may have been the purpose thereof and, further, if a new rule was announced or even if not, the retroactive effect to be given to this decision.

We submit that the new rule as to retroactivity proposed by the Court of Appeals for antitrust decisions has no support in any decision of this Court, that it is erroneous, that it will impair the institution of treble damage actions as a useful instrument in the enforcement of the antitrust laws, that it will work injustice in the instant case and that it should be rejected.

The point is of public importance in its effect on all treble damage actions under the antitrust laws. This is shown by the effect produced in the instant case. The new rule has been used to nullify the claim of the victim for reimbursement and to spare the wrongdoer "the penalty of treble damages" at the expense of the victim. The plain fact is that injury to Hanover was just as great both before and after the decision in *American Tobacco*.

3. The Court of Appeals erroneously construed the three early decisions of this Court in which United was a defendant in antitrust actions brought by the United

States* and concluded that it was error for the District Court to have awarded damages to Hanover "for conduct manifestly pursued in the shelter of Supreme Court approval" (App. p. 22a). We submit that it was error to conclude that the conduct that was in issue in the Government case and that was found to be violative of Section 2 of the Sherman Act in the *per curiam* decision of this Court was pursued "in the shelter of Supreme

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* *United States* v. *Winslow*, 227 U. S. 202 (1913) involved an indictment that, as construed by the District Court, attacked only the original combination of 1899 under which United was created. On demurrer, the indictment was held not to charge an offense under the Sherman Act. The leasing practices and provisions were not in issue, id. at 217.

*United States* v. *United Shoe Machinery Co.*, 247 U. S. 32 (1918) was an unsuccessful civil action to dissolve United. The decision of the District Court dismissing the complaint was affirmed. The Court held that the plants and patents of the companies that were combined in the original combination were supplementary and non-competitive, id. 38-56. The leasing arrangements were sustained as lawful exercises of patent rights, id. 57-65. See also infra 258 U. S. 451 at 460. It is in this 1918 opinion of Mr. Justice McKenna that remarks are made as to the advantages of the leasing arrangement to shoe manufacturers big and little, id. at 63, the advantage in the service of United and the excellence of its machines, id. at 64, 66. None of these passing encomiums alter the holding that the leasing arrangements were sustained as lawful exercises of patent rights, id. 61-65.

*United Shoe Machinery Corporation* v. *United States*, 258 U. S 451 (1922) was a civil action under Section 3 of the Clayton Act to enjoin use of leases of shoe machinery containing certain restrictive tying clauses. This Court noted that while the former decision rested on the validity of the restrictive conditions under patents held by United, the present case was brought under the Clayton Act which expressly applied to leases of machinery whether "patented or unpatented." The Court added that the validity of the restrictive tying clauses under the Clayton Act test "was not and could not have been involved or decided in the former suit," id. at 462. The Court held that the leases were made on conditions prohibited by Section 3 of the Clayton Act. United's lease only policy which, together with the restrictive clauses in its leases, was found by Judge Wyzanski in the Government case to constitute monopolization under the Sherman Act, was not under attack or in issue in this Clayton Act case.

Court approval" when the matters in issue in the Government case were not in issue or in any way before this Court in the three prior cases. In addition, the Court of Appeals misapplied these three earlier decisions in holding that the effect to be given to them was to render it erroneous for the District Court to award damages to Hanover for the conduct of United prior to *American Tobacco, supra,* as shown in this record and which was adjudicated as violative of the Sherman Act in the Government case.

## CONCLUSION

**For the foregoing reasons, this petition for a writ of certiorari should be granted.**

Respectfully submitted,

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*The Hanover Shoe, Inc.,*

BRECK P. MCALLISTER,
RUSSELL J. O'MALLEY,
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*Of Counsel.*

July 10, 1967.

## APPENDIX A

## Opinion of the Court

(Filed April 11, 1967)

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

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No. 15626

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THE HANOVER SHOE, INC.

*v.*

UNITED SHOE MACHINERY CORPORATION,

*Appellant.*

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No. 15627

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THE HANOVER SHOE, INC.,

*Appellant,*

*v.*

UNITED SHOE MACHINERY CORPORATION

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APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

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Argued May 3, 1966

Before FOREMAN, GANEY and FREEDMAN, *Circuit Judges*

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*Opinion of the Court*

FREEDMAN, *Circuit Judge:*

This private antitrust action presents a number of important questions.

Plaintiff, The Hanover Shoe, Inc., is a manufacturer of shoes and a customer of defendant, United Shoe Machinery Corporation, a manufacturer and distributor of shoe machinery. In this action brought under § 4 of the Clayton Act (15 U.S.C. § 15) based on violations of § 2 of the Sherman Act (15 U.S.C. § 2) Hanover obtained a trebled damage judgment against United in the amount of $4,239,609, with interest, and an award of $650,000 for counsel fees. United appeals from the judgment on a number of grounds, and Hanover has taken a cross-appeal on the ground that there was not sufficient evidence to support the district court's rejection of one of its large items of damage.

THE PROCEEDINGS

Almost twenty years ago, on December 15, 1947, the United States brought a civil action against United in the United States District Court for the District of Massachusetts, under § 4 of the Sherman Act (15 U.S.C. § 4) to restrain alleged violations of §§ 1 and 2 of the Act (15 U.S.C. §§ 1, 2). Judge Wyzanski, who heard the case, graphically detailed what he called the "prodigious length" of the trial. "[T]he hearings took 121 days and covered 14,194 pages of transcript and included the offer of 5512 exhibits totalling 26,474 pages (in addition to approximately 150,000 pages of OMR's [records concerning machines in shoe factories as of a certain date] and over 6,000 soft copies of patents) and 47 depositions covering 2122

pages. At the close of the evidence the Court asked for briefs, and requested findings of fact and conclusions of law. The Government offered briefs totalling 653 pages, and requests totalling 667 pages. United submitted briefs totalling 1240 pages, and requests totalling 499 pages."[1] On February 18, 1953, Judge Wyzanski filed an elaborate opinion in which he found that United was guilty of monopolization in violation of § 2 of the Sherman Act. *United States v. United Shoe Machinery Corp.*, 110 F.Supp. 295 (D.Mass. 1953). The Supreme Court affirmed on May 17, 1954 in a per curiam opinion. *United Shoe Machinery Corp. v. United States*, 347 U.S. 521 (1954).

More than a year later, on September 21, 1955, Hanover brought the present treble damage action against United in the United States District Court for the Middle District of Pennsylvania. By pretrial agreement the parties submitted for preliminary decision the defense that any excessive rentals charged to Hanover for shoe machinery would not constitute an injury to its business or property if the excess was passed on to its customers. After the hearing had been held on this issue the district judge died and Chief Judge Biggs designated Circuit Judge Goodrich in his place. Judge Goodrich summarized the complaint as charging that defendant, "as a result of its unlawful control of the market, has caused plaintiff . . . to pay excessive rentals for the lease of shoe machinery." He held as a matter of law that if United was guilty of monopolization and had charged Hanover excessive rentals, Hanover had a cause of action for the difference between what it was charged and what it could properly have been charged in the ab-

1. United States v. United Shoe Machinery Corp., 110 F.Supp. 295, 299 (D.Mass. 1953), aff'd, 347 U.S. 521 (1954).

sence of monopolistic practices. He also held that the injury occurred when Hanover was overcharged for the machinery and that since the cause of action arose at the moment the tort occurred, United would not be relieved of liability because subsequent events might have alleviated some of the ultimate consequences of the wrong, for these would not inure to the benefit of the defendant. Judge Goodrich certified that the case was appropriate for an interlocutory appeal under 28 U.S.C. § 1292(b), because the issue involved a controlling question of law as to which there was substantial ground for difference of opinion, and an immediate appeal might materially advance the ultimate termination of the litigation. *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 185 F.Supp. 826 (M.D.Pa. 1960). We affirmed in a per curiam opinion in which we rejected the claim that treble damages would result in a windfall to Hanover, stating that Congress had imposed this rigorous penalty and any modification was for it to make and not for the courts. *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 281 F.2d 481 (3 Cir. 1960), cert. denied, 364 U.S. 901 (1960).

After a subsequent trial without a jury, Chief Judge Sheridan on April 28, 1965 filed a comprehensive opinion holding that Hanover was entitled to recover treble damages for the excess of the leasing costs over what it would have cost to own the same machines had they been available for purchase. Damages were limited to the period beginning July 1, 1939 on the ground that any earlier period was barred by the Pennsylvania statute of limitations, and were awarded to September 21, 1955, the date the action was brought. *The Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 245 F.Supp. 258 (M.D.Pa. 1965).

Hanover's alternative claim for damages, that the leasing charges were themselves excessive, was rejected by the district court because the Government decree, on which Hanover relied, had made no finding that United's leasing charges were excessive. Hanover has not sought review of this ruling on appeal. On August 12, 1965 Chief Judge Sheridan denied United's motion for a new trial, and entered the judgment from which these appeals are taken.

ACQUIESCENCE AND DEMAND

At the outset United contends that Hanover acquiesced in its leasing system which helped Hanover to obtain high profits and gave Hanover special benefits such as the right to return obsolete machines and the free services of United's technicians on problems in shoe making. According to United, the absence of a formal demand by Hanover for the sale of United's shoe machinery is fatal to Hanover's claim.

The court below found that "Hanover has proved that as a consequence of United's monopolization it was unable to purchase most of the more important machines which it would have purchased had they been available." 245 F. Supp. at 287. This finding negatives any inference of acquiescence in the United leasing system. The finding in the Government case of the existence of the monopoly and of United's policy against sales, the participation of Mr. Sheppard, Hanover's president, in the effort of a trade association of which he was president to persuade United to offer more of its machinery for sale and Hanover's purchase of machinery from United when it first became possible to do so by virtue of the Government decree, sufficiently support

the finding by the court below and forbid our declaring it to be clearly erroneous.

The question remains, however, of the necessity of a formal demand for the purchase of machines during the damage period. On this issue the court below found: "Hanover never asked United if it could buy the lease-only machines. Neither did it protest its inability to buy. Mr. Sheppard testified that any such request would have been a 'foolish question.' This explanation does not seem unreasonable in view of the findings in the Government case and the evidence in this case." 245 F.Supp. at 280.

Hanover was, as the court below found, along with the entire shoe machinery industry, a "captive customer" of United. What the witness characterized as foolish amounts to a futile gesture which the law does not require. Hanover had been a customer of United in the leasing of machinery for many years. It was well aware of United's power as the supplier of machinery and of its policy against sales. In such circumstances it would be ironic as well as idle to require the victim of the monopoly to make an explicit demand the denial of which was implicit in the continuance of the monopoly. See *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 699 (1962).

INJURY

1. United urges that its leasing system did no injury to Hanover because Hanover's competitors were subject to the same practices which United uniformly imposed on all its customers. This is a remarkable proposition. It is founded upon the premise that harm done to a customer loses its injurious effect when similar harm is inflicted upon

other customers similarly situated. It would punish a partial wrong but absolve it if it is widespread and thus would reduce the antitrust laws to a moral imperative without realistic effect. There is no reason to relieve actual injury on a basis so unrealistic and undesirable. *Keough v. Chicago & Northwestern Railway Co.*, 260 U.S. 156 (1922) does not require us to do so. There a shipper sued several railroads for treble damages on the ground that they had by agreement among themselves fixed excessive freight rates. United relies on the statement by Mr. Justice Brandeis that the exaction of the alleged excessive rate, which had been approved by the Interstate Commerce Commission, might not have harmed the plaintiff because all other shippers were entitled to be put on a parity with him. What was involved in *Keough*, however, was a case of "plain repugnancy between the antitrust and regulatory provisions,"[2] for the plaintiff was held barred from invoking the original treble damages provision of the Sherman Act because he was limited to the remedy provided by §8 of the Interstate Commerce Act which conferred a right to untrebled damages where a carrier charged an illegal rate. The statement relied on by United plainly was dictum and was unnecessary to the decision in the case; it is not controlling here. See, e.g., *Commonwealth Edison Co. v. Allis-Chalmers Manufacturing Co.*, 335 F.2d 203, 205-6 (7 Cir. 1964); *Atlantic City Electric Co. v. General Electric Co.*, 226 F.Supp. 59, 65-66 (S.D.N.Y. 1964).

2. United also contends that Hanover suffered no injury from United's no-sale policy in the damage period

2. See United States v. Philadelphia National Bank, 374 U.S. 321, 351 (1963); Pan American World Airways, Inc. v. United States, 371 U.S. 296, 322 (1963), Brennan, J., dissenting.

because it could have obtained foreign machinery. The court below found, however, that the foreign machinery which was available was not aceptable to Hanover both because of its inadequate capacity and performance and the lack of available servicing and technical advice. 245 F. Supp. at 285, 286. We cannot say from the record that this finding is clearly erroneous.

3. United claims that Hanover was not legally injured because the leases were lawful and therefore no damage could result from them. The claim of legality of the leases is based on an abstract characterization, torn from the context of United's market control. Judge Wyzanski specifically held that the leases which United employed constituted a means of its monopolization of the industry. Since the leases, although valid as instruments conferring the right of possession on the lessee, were instruments of monopolization, their lawfulness in the abstract does not undo their character as weapons in the consummation of the monopoly: Neither *Bruce's Juices, Inc. v. American Can Co.*, 330 U.S. 743 (1947) nor *Kelly v. Kosuga*, 358 U.S. 516 (1959) are of aid to United. They refused to allow a party to a contract to avoid payment thereunder because the underlying contract violated the antitrust laws. This was because the antitrust laws do not provide such a remedy: "The Act prescribes sanctions, and it does not make uncollectibility of the purchase price one of them." *Bruce's Juices, Inc. v. American Can Co., supra* at 750. The court expressly recognized, however, that the appropriate remedy for injury resulting from a violation of the antitrust laws was a treble damage suit. What was said in those cases regarding contracts which are intrinsically or inher-

ently illegal related merely to the right to avoid payment thereunder and not to the remedy available for violation of the antitrust laws.[3]

4. United also claims that Hanover passed on to its customers the difference between what it paid to United in rentals and what it would have cost it to purchase the machines. The validity of a passing-on defense in this case was decided by Judge Goodrich in *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 185 F.Supp. 826 (M.D.Pa. 1960), aff'd, 281 F.2d 481 (3 Cir. 1960), cert. denied, 364 U.S. 901 (1960). United seeks to distinguish the effect of the decision because it was based on the assumption that the damage claim was for excessive rental charges, whereas the judgment below is based on the difference between the rentals charged and the reasonable cost of the machinery if Hanover had purchased it.

Even if we assume that Judge Goodrich's determination of the passing-on issue is not binding here, his reasoning, which we accept, extends equally to the present claim. As we have seen, he pointed out that the antitrust laws deal with a plaintiff at the moment of injury and do not look to subsequent events which may have reduced the impact of the wrongful conduct. The fact that Hanover might have recouped some of that damage later by increasing the prices of its shoes is irrelevant to the question of damage. We may, indeed, add that if United's claim

3. Turner Glass Corp. v. Hartford-Empire Co., 173 F.2d 49 (7 Cir. 1949) was a special antitrust case involving patents in which plaintiff conceded that it would not be entitled to recover unless the agreements were inherently illegal. In any event, to the extent that it would support United's claim that the leases must be inherently illegal to support an antitrust action for damages, we decline to follow it.

were accepted it would be difficult to apply the antitrust laws in a prosperous industry, where damages would readily be passed on to the consuming public. It would be contrary to the far-reaching social and economic purposes of the antitrust laws to afford release from their obligations to an economic wrongdoer because his victim in self-defense sought recoupment for the injury from the consuming public.

Our decision in *Freedman v. Philiadelphia Terminals Auction Co.*, 301 F.2d 830 (3 Cir. 1962), cert. denied, 371 U.S. 829 (1962), does not impair our rejection of passing-on as a defense by a violator of the antitrust law. There fruit brokers brought a treble damage suit for violation of the Robinson-Patman Act resulting from an improper terminal charge. The brokers had purchased the fruit at the defendant's auction on behalf of regular clients and the jury made a special finding that plaintiffs suffered no injury because they received a separate commission for their services, and their clients paid all the charges, including the terminal charges. In upholding the passing-on defense we specifically distinguished the case from the present one. Judge Kalodner, speaking for the Court, said: "Hanover affords no nourishment to plaintiffs' contention with respect to it. There the District Court in granting relief to the plaintiff premised its action on its fact-finding that plaintiff was a *consumer* and not a *middleman* and implicit in that distinction is its subscription to the doctrine enunciated in earlier cases that middlemen cannot recover damages where they suffer no injury by reason of their payment of proscribed charges." (p. 833). Moreover, the question of multiple liability is fundamental in determining whether the passing-on defense shall have

validity. See *Commonwealth Edison Co. v. Allis-Chalmers Manufacturing Co.*, 335 F.2d 203, 208-9 (7 Cir. 1964); *Atlantic City Electric Co. v. General Electric Co.*, 226 F.Supp. 59, 71 (S.D.N.Y. 1964). This explains the difference between the present case and *Freedman*. There it was the clients of the brokers who had the direct injury which would support treble damage claims against the auctioneer. Here, however, the injury to the customers who purchased the shoes which Hanover made with the machinery it acquired from United is too remote and its force too fragmentized and diluted to support a claim by the individual customers of Hanover.[4]

REMOTENESS OF INJURY

What has been said regarding the passing-on defense supplies in part the answer to United's contention that any damage that Hanover suffered is too remote and indirect to support a cause of action under § 4 of the Clayton Act, which requires not only injury, but also a causal relationship between the antitrust violation and the injury.[5] The court below found that "Hanover's injury flows proximately from the monopolization," and that by the leases United extracted "large sums of money in excess of the

4. Wolfe v. National Lead Co., 225 F.2d 427 (9 Cir. 1955), cert. denied, 350 U.S. 915 (1955), which United urges upon us, was specifically rejected by Judge Goodrich (185 F.Supp. at 831) whose opinion we affirmed.

5. "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

reasonable value of machinery and of the service rendered by United." 245 F.Supp. at 274. In this respect the case resembles *Chattanooga Foundry & Pipe Works v. City of Atlanta*, 203 U.S. 390 (1906), where it was held that injury was sufficiently demonstrated by the City's payment of more than the reasonable price of the defendant's pipes because of defendant's price fixing.[6] Here, as in that case, the cost to the customer of doing business was increased as a result of the monopolist's conduct. The consequences of the injury therefore were direct and the cause of action under the narrowest construction of § 4[7] was made out. In the context of the relation of machinery monopolist and customer manufacturer no more direct injury could be inflicted.

### Effect of the Government Decree as to the Lease-Only Policy

Section 5a of the Clayton Act (15 U.S.C. § 16a) makes the Government decree "prima facie evidence" against United in the present action "as to all matters respecting which said judgment or decree would be an estoppel as between the parties thereto."

Here the Government decree expressly declared that United's leases with any one of four specified restrictive

6. See also Georgia v. Evans, 316 U.S. 159 (1942).

7. It is unnecessary for us to consider whether the broad terms of the statute should be narrowed by construing § 4 to require that the injury be "direct," Karseal Corp. v. Richfield Oil Corp., 221 F.2d 358 (9 Cir. 1955), or whether a presumption of liability exists once injury has been shown, South Carolina Council of Milk Producers, Inc. v. Newton, 360 F.2d 414 (4 Cir. 1966); Note, Standing to Sue for Treble Damages under Section 4 of the Clayton Act, 64 Colum. L. Rev. 570, 586-88 (1964). See also Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690 (1962).

provisions—a term of ten years, a full capacity clause, deferred charges on return and non-segregation of repair and service charges—were means by which United had monopolized the shoe machinery industry. The decree does not contain any comparable declaration regarding United's failure to make shoe machinery available for sale. From this United argues that the Government decree is not prima facie evidence that its failure to offer shoe machinery for sale was illegal, since this is not a matter which was adjudicated in the Government case. For additional support it points to the fact that Paragraph 61 of the Government's complaint expressly alleged that United had refused to sell machinery, and urges that this was one of the "other charges of violation of the Sherman Act set forth in the complaint" which Section 2 of the Government decree declared "are dismissed with prejudice." On the face of the decree, therefore, United's contention is not lacking in merit.

United supports its contention by the claim that the courts are limited to the Government decree itself in determining the existence and extent of an estoppel under § 5a unless it is necessary to go beyond it to resolve an ambiguity in the decree. Such a construction of § 5a would seriously weaken its underlying policy of lightening the burden on private antitrust plaintiffs, who play such an important role in the implementation of the antitrust laws.[8] It is in harmony with that policy to give prima facie effect

8. See, e.g., Bruce's Juices, Inc. v. American Can Co., 330 U.S. 743, 751-52 (1947); Emich Motors Corp. v. General Motors Corp., 340 U.S. 558, 567-68 (1951); Radovich v. National Football League, 352 U.S. 445, 453-54 (1957); Minnesota Mining & Manufacturing Co. v. New Jersey Wood Finishing Co., 381 U.S. 311, 318-19 (1965).

to any fact which the findings or the opinion fairly show was actually adjudicated in the Government case.[9] To do otherwise would hamper on a technicality of form the policy of affording private antitrust litigants the fullest benefit of a successful Government suit. In *Emich Motors Corp. v. General Motors Corp.*, 340 U.S. 558, 568-69 (1951) the Supreme Court held that a criminal judgment was available to private litigants as prima facie evidence of "all matters of fact and law necessarily decided by the conviction and the verdict," since § 5a embodied a Congressional policy "to confer, subject only to a defendant's enjoyment of its day in court against a new party, as large an advantage as the estoppel doctrine would afford had the Government brought suit." This goes further than the use of the determinations which appear in the findings and opinion of the judge sitting without a jury in a civil case.

United would distinguish *Emich* on the ground that it rested on a general verdict of guilty which does not specifically indicate the nature of the jury's findings and that the conclusion in that case therefore was a result of necessity. The absence of any factual finding in a criminal verdict is no reason for holding that findings by a judge without a jury in a civil case are to be ignored because his decree is more elaborate.

We turn then for illumination to the elaborate findings of fact and opinion of Judge Wyzanski which accompanied the decree. A separate heading entitled "Effects of the Leasing System" in the findings of fact describes the

9. Under Rule 52(a) findings of fact and conclusions of law need not be isolated under such specific designations if they appear generally in the opinion of the court.

effect of United's leasing system as it worked in practice from the viewpoint of United, of shoe manufacturers and of potential and actual competitors of United. In dealing with the effect of United's leasing system on shoe manufacturers, there is a full appraisal of the advantages to the shoe manufacturer and note is made of the virtual absence of dissatisfaction with the system. Judge Wyzanski then went on to say: "However, while United's system has made it easier to enter the shoe manufacturing industry than to enter many, perhaps most, other manufacturing industries, it has not necessarily promoted in the shoe manufacturing field the goals of a competitive economy and an open society. Without attempting to make findings that are more precise than the evidence warrants, this much can be definitely stated." 110 F.Supp. at 323-24. There follow six consequences to shoe manufacturers *if United's machinery* were available for sale. Among these is the fact that shoe manufacturers who bought United's machines "would not be subject, as are those manufacturers who lease United machines, to the unilateral decision of United whether or not to continue or modify those informal policies which are not written in the leases and to which United is not expressly committed for any specific future period. . . . United's reserved power with respect to these matters gives it some greater degree of psychological, and some greater degree of economic control, than a seller of machinery would have." 110 F.Supp. at 324. In another category is this statement: "Some manufacturers who had bought machinery would find that financial and psychological considerations made them more willing than lessees would be, to dispose of already acquired United machines

and to take on competitors' machines in their place." 110 F.Supp at 324. These statements are reiterated in a form which shows that this effect was inherent in the lease-only system itself, and did not arise solely from the four restrictive features: "Yet as already noted, a shoe manufacturer may psychologically or economically be more impeded by a leasing than by a selling system. And this general observation is buttressed by a study of features in the United leasing system which have a special deterrent effect." 110 F.Supp. at 324.

Throughout his opinion Judge Wyzanski repeatedly stressed this distinction between the special obstacles to competition established by the four restrictive provisions in the United leases, and the general anti-competitive effects which flowed from the mere existence of a lease-only system. On the latter issue, he recognized the "magnetic ties inherent in [United's] . . . system of leasing, and not selling, its more important machines," and stressed that these ties, especially in the context of United's market control, fostered a sense of "partnership" among United and its customers which made it more difficult for another manufacturer of shoe machinery to take away part of the United market.[10] Moreover, he declared that the end of

10. "However, United's leases, in the context of the present shoe machinery market, have created barriers to the entry by competitors into the shoe machinery field.

"First, the complex of obligations and rights accruing under United's leasing system in operation deter a shoe manufacturer from disposing of a United machine and acquiring a competitor's machine. He is deterred more than if he owned that same United machine, or if he held it on a short lease carrying simple rental provisions and a reasonable charge for cancellation before the end of the term. The lessee is now held closely to United by the combined effect of the 10-year term, the requirement that if he has work available he must use the machine to full capacity, and by the return charge which can in practice, through the right of deduction fund, be reduced to insignificance if

the lease-only system would also increase competition by

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he keeps this and other United machines to the end of the periods for which he leased them." 110 F.Supp. at 340.

"In estimating defendant's strength, this Court gives some weight to the 75 plus percentage of the shoe machinery market which United serves. But the Court considers other factors as well. In the relatively static shoe machinery market where there are no sudden changes in the style of machines or in the volume of demand, United has a network of long-term, complicated leases with over 90% of the shoe factories. These leases assure closer and more frequent contacts between United and its customers than would exist if United were a seller and its customers were buyers. Beyond this general quality, these leases are so drawn and so applied as to strengthen United's power to exclude competitors." *Id.* at 343.

"But United's control does not rest solely on its original constitution, its ability, its research, or its economies of scale. There are other barriers to competition, and these barriers were erected by United's own business policies. Much of United's market power is traceable to the magnetic ties inherent in its system of leasing, and not selling, its more important machines. The lease-only system of distributing complicated machines has many "partnership" aspects, and it has exclusionary features such as the 10-year term, the full capacity clause, the return charges, and the failure to segregate service charges from machine charges. Moreover, the leasing system has aided United in maintaining a pricing system which discriminates between machine types." *Id.* at 344.

"Furthermore, the creation of a sales market together with the purging of the restrictive features of the leases will, in combination, gradually diminish the magnetic hold now exercised by what United properly describes as the partnership features of the leasing system. As United's relationships with its customers grow feebler, competitors will have an enhanced opportunity to market their wares. . . .

"A further answer is that if the creation of a sales alternative to leasing is, as this Court believes, necessary to dissipate United's monopoly power, the Court should not withhold its degree because its effect is to allow competitors to copy United's designs." *Id.* at 350.

See Kaysen, United States v. United Shoe Machinery Corporation (1956), p. 275: "The most important single alteration in the operation of the shoe machinery market leading to an increase in the degree of competition therein is the end of the lease method of marketing, and the dissolution of the lease bundle which United provides under that method." See also pp. 193-94, 197-98, 276. Kaysen, an economist, acted as Judge Wyzanski's law clerk so that he could serve as an economic assistant on the United Shoe case. Kaysen's book is a reprint, with additional material, of the memorandum which he submitted to Judge Wyzanski after two years of research.

making available secondhand machines, which would promote a "substitute competition" and would make it possible for other manufacturers to study the United machines so as to experiment with alterations in them and to copy their unpatented features.[11] Finally, although he ordered United's leases to be purged of their restrictive provisions in the future, he also ordered United in Section 5 of the decree to offer for sale in the future any machine which it held out for lease. Judge Wyzanski thus justified this provision: "[United] has used its leases to monopolize the shoe machinery market. And if leasing continues without an alternative sales system, United will still be able to monopolize that market. To root out monopolization and to bring United, in the future, in the same class as its competitors, it is necessary not merely to place limitations upon United's leases, but also to require United to offer for sale any machine type which it leases. While, on its face, the decree seems to discriminate against United, in the context of the market situation created by United itself, the effect of the decree is to break down barriers erected by a monopolizer, so that, hereafter, there may be no wall between the class in which it is and the class in which its competitors are."[12] Rejecting the Government's suggestion that the decree require United to make its sales terms

11. 110 F.Supp. at 344, 349-50. See also Kaysen, supra, at p. 73: ". . . the absence of a second-hand machinery market, which is a consequence of the leasing system, is a substantial support to United's market dominance and is probably second in importance in its effect on United's market power only to the duration of the lease and the circumstances surrounding terminations of leases among all the aspects of the leasing system which affect that power."

12. 110 F.Supp. at 350.

more attractive to customers than its lease terms, the opinion states: "[I]t seems to the Court sufficient to direct defendant, if it offers any machine type for lease, to set such terms for leasing that machine as do not make it substantially more advantageous for a shoe factory to lease rather than to buy a machine." 110 F.Supp. at 351.

All this, we believe, demonstrates that the lease-only system itself was adjudicated in the Government case to be a means of monopolization. Read in the light of the policy of making the Government's decree fully available to the private antitrust plaintiff, Hanover is entitled to the benefit of the determination and United is estopped from questioning it. See *Emich Motors Corp. v. General Motors Corp., supra,* at 568.

THE RETROSPECTIVE EFFECT OF THE GOVERNMENT DECREE

The court below concluded that the adjudged violations were illegal from their initiation decades earlier, but it limited damages to the period within the statute of limitations as suspended by various tolling provisions. See 245 F.Supp. at 294, n. 15.

The Government decree, entered in the District Court in Massachusetts on February 18, 1953 and affirmed by the Supreme Court on May 17, 1954, prohibited United after "A-Day," which turned out to be January 1, 1955, from offering machines for lease unless it also offered them for sale. United urges that the decree was meant to operate only prospectively. In support of this view it points to the absence of any specific declaration in the decree that the lease-only system violated the antitrust law and maintains that the exclusive purpose of the decree was to break up United's market power in the future.

What we have already said requires us to reject the contention that the Government decree has no retrospective effect. For the remedial character of an equity decree does not necessarily imply that the conduct which it prohibits in the future was valid in the past. Decrees such as the Government decree are aimed at redressing the effects of antitrust violations in the future, and acceptance of United's contention would subvert the purpose of § 5a, for it would put an end to treble damage recovery by private parties in reliance on Government decrees, since they are prima facie evidence only in cases where the damage period is within the period covered by the Government case. *International Shoe Machinery Corp. v. United Shoe Machinery Corp.*, 315 F.2d 449 (1 Cir. 1963), cert. denied, 375 U.S. 820 (1963); *Dart Drug Corp. v. Parke, Davis & Co.*, 344 F.2d 173, 184-86 (D.C.Cir. 1965).[13]

This leads us to the question of the extent of the retroactivity of the Government decree.

Judge Wyzanski made vividly clear the extraordinary position of United in regard to the antitrust laws. Three times, in 1913, in 1918 and in 1922, United had been under the scrutiny of the Supreme Court. *United States v. Winslow*, 227 U.S. 202 (1913); *United States v. United Shoe Machinery Co. of N.J.*, 247 U.S. 32 (1918); *United*

13. There is no dispute that United machines leased by Hanover were unavailable for sale to Hanover before June 1, 1955, the date on which Judge Wyzanski approved United's plan for terminating the leases. Moreover, the court below made specific findings as to the unavailability and unsuitability of other manufacturers' machines which were offered for sale for any part of the 1939-1955 period. In these circumstances, Hanover is not barred from damages occurring before June of 1951, the date of the close of evidence in the Government case (Compare International Shoe Machinery Corp. v. United Shoe Machinery Corp., supra), nor does United so argue.

*Shoe Machinery Corp. v. United States,* 258 U.S. 451 (1922). In Judge Wyzanski's words: "What United is now doing is similar to what it was then doing, but the activities which were similar stood uncondemned,—indeed, one ought to go further and say they were in part endorsed." 110 F.Supp. at 348.[14] He held that the last two cases still had enough vitality to prevent his holding, as he otherwise would, that United had violated § 1 of the Sherman Act by its lease-only practice. "[T]his inferior court feels precluded," said Judge Wyzanski, "from so deciding because of the overhanging shadows of . . . the Sherman and Clayton Act cases involving this company's predecessor and itself. Though these cases may ultimately be overruled by the Supreme Court, they have not yet lost all authority." 110 F.Supp. at 343. Judge Wyzanski was of the view, however, that the interpretation of § 2 of the Sherman Act was significantly changed in 1946 when the Supreme Court in *American Tobacco Co. v. United States,* 328 U.S. 781, 811-15 (1946) expressly approved Judge Learned Hand's analysis in 1945 in the *Alcoa* case, *United States v. Aluminum Co. of America,* 148 F.2d 416 (2 Cir. 1945). Judge Wyzanski stressed the absence in United's conduct of predatory practices, which the decisions prior to *Alcoa* had emphasized as an element in monopolization.[15] He held that United's conduct now ran afoul, however, of § 2 under the *Alcoa* doctrine, which brought within its prohibition monopolization attained by conduct which although

14. This was so even though certain provisions of its leases, since terminated, had been held violative of § 3 of the Clayton Act in the third case, for United was specifically found free of the taint of predatory practices. 258 U.S. at 455.

15. See, e.g., United States v. United States Steel Corp., 251 U.S. 417 (1920).

"honestly industrial" cannot be said to render market control, which is inherently evil, an economically inevitable result, for in such a case it cannot be said of a defendant that greatness was thrust upon him. 110 F.Supp. at 341-42. In so finding, however, Judge Wyzanski said: "It is only fair to add that the more than 14,000 page record, and the more than 5,000 exhibits, representing the diligent seven year search made by Government counsel aided by this Court's orders giving them full access to United's files during the last 40 years, show that United's power does not rest on predatory practices. Probably few monopolies could produce a record so free from any taint of that kind of wrongdoing." 110 F.Supp. at 345.

In these circumstances, we believe it was error to hold that United was liable in damages to Hanover for the period stretching back to the beginning of its conduct, despite the approval of its leasing policy in various forms by three successive decisions of the Supreme Court. The court below cut off damages prior to July 1, 1939 only because the statute of limitations barred such recovery. On the contrary, we think it erroneous to award damages for conduct manifestly pursued in the shelter of Supreme Court approval, at least until such time as subsequent decisions have clearly announced a change in the applicable law. This conclusion follows from Judge Wyzanski's opinion and the modern view of the rights of parties who have relied upon authoritative statements of the law which are later changed.

Recent decisions of the Supreme Court in criminal cases have made it clear that the unrealistic theory that the law has always been what the latest case for the first time declares it to be, the so-called Blackstonian view, must yield

to the practical realization that conduct had occurred in reliance on the earlier rules of law to the contrary.[16] In antitrust cases the question of retroactivity is still open.[17] We believe that retroactivity should be determined from the circumstances of the particular case, having in mind the purpose which the new rule of law seeks to accomplish and the practical weighing of the comparative benefits and evils of retroactivity. In civil cases, unlike criminal cases, it is appropriate to recognize that businessmen must rely upon counsel, who in turn are guided by the existing precedents in making difficult decisions on the effect of the antitrust laws on specific business conduct. In suits for damages in such cases it is particularly appropriate to be mindful of the injustice of retroactive imposition of the penalty of treble damages. In the present case the penalty of treble damages is enough, in conjunction with the absence of predatory practices and the survival of United's leasing policy under the Sherman Act after three passages through the Supreme Court, to require that United should not be held to have violated the antitrust laws before the change occurred in the law which for the first time made its conduct unlawful.

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16. Thus, e.g., retroactivity was refused to be accorded in Linkletter v. Walker, 381 U.S. 618 (1965), to Mapp v. Ohio, 367 U.S. 643 (1961), dealing with exclusion of illegally seized evidence; in Tehan v. United States ex rel. Shott, 382 U.S. 406 (1966), to Griffin v. California, 380 U.S. 609 (1965), dealing with comment on the failure of a defendant in a state criminal trial to take the stand; in Johnson v. New Jersey, 384 U.S. 719 (1966), to Escobedo v. Illinois, 378 U.S. 478 (1964) and Miranda v. Arizona, 384 U.S. 436 (1966), dealing with custodial police questioning of criminal suspects. See also Butcher v. Philadelphia, 380 Pa. 290 (1955).

17. Simpson v. Union Oil Co., 377 U.S. 13, 24-25 (1964); see also Lyons v. Westinghouse Electric Corp., 235 F.Supp. 526, 536-37 (S.D.N.Y. 1964).

The remnant of the problem which remains is whether the appropriate date which marks the commencement of liability should be the date of the *American Tobacco* decision of June 10, 1946 or the *Alcoa* decision of March 12, 1945. The high authority of Judge Hand's opinions and the unusual circumstances in which *Alcoa* came to be decided give the case a place of preeminence in the history of antitrust law. We do not believe, however, that another business which had three times in various forms been adjudged free from violation of the Sherman Act was required to abandon its well known form of operation before Judge Hand's view in *Alcoa* received the imprimatur of the Supreme Court, however inevitable it may now seem in retrospect. At the time it was well known that *Alcoa* could not be passed on by the Supreme Court,[18] and whether it would agree with

18. The decision in Alcoa by the Circuit Court of Appeals for the Second Circuit was final because of the unique circumstances which surrounded the case. The district court had dismissed the complaint, United States v. Aluminum Co. of America, 44 F.Supp. 97 (S.D.N.Y. 1941), and on a direct appeal the Supreme Court was without a quorum due to the disqualification of four Justices. The Court therefore transferred the case to a special docket and postponed further proceedings in the appeal until such time as there was a quorum of Justices qualified to sit in the case. 320 U.S. 708 (1943). Congress thereafter amended 15 U.S.C. § 29 by the Act of June 9, 1944, ch. 239, 58 Stat. 272, which provided that in such circumstances the Court should certify the case to the appropriate circuit court of appeals, in lieu of a decision by the Supreme Court, and the decision of the circuit court of appeals should be final and unreviewable. Acting under the statute the Supreme Court certified the case to the Circuit Court of Appeals for the Second Circuit and it was in what Mr. Justice Frankfurter concurring in United States v. United States District Court for the Southern District of New York, 334 U.S. 258, 265 (1948) called "an extraordinarily rare, if not unique, situation in the history of the Court," that Judge Learned Hand's decision came to be written in Alcoa. See also American Tobacco Co. v. United States, 328 U.S. 781, 811-12 (1946).

Judge Hand's opinion could only be made known in another case, as it was a year later in *American Tobacco* on June 10, 1946.

We conclude, therefore, that United's conduct cannot be held to have violated § 2 of the Sherman Act at any time prior to June 10, 1946. We believe this is the effect to be given to the Government decree. The damages recoverable by Hanover therefore may not reach any earlier period.

CERTIFICATION

United urges that the court below should have certified to the District Court in Massachusetts the questions dealing with the interpretation and effect of that court's decree. The obvious economy in judicial effort which would follow from such a practice, especially in a case as protracted as the Government suit against United, speaks strongly in its favor. On the other hand, there is much to be said for a litigant's right to the judgment of the court which he invokes and for the view that the scope of the conclusions and decrees of sister federal courts, however complicated may be the litigation out of which they arose, may well be determined by an objective evaluation of what has been recorded in opinion and decree rather than by a subjective interpretation which may include in retrospect what was locked in the breast of the original judge.

In the circumstances which prevail in this case, however, we need not determine this interesting question.[19] United did not apply for certification of the questions relat-

19. See United States Gypsum Co. v. National Gypsum Co., 352 U.S. 457 (1957); see also Levin, Inter-Jurisdictional Certification: Beyond Abstention Toward Cooperative Judicial Federalism, 111 U. Pa. L. Rev. 344 (1963).

ing to the meaning and effect of the Government decree during the lengthy trial in the court below. It did not even do so immediately after the opinion was filed in the district court on April 28, 1965. Instead, on May 21, 1965, United applied to Judge Wyzanski in the District Court in Massachusetts on notice to Hanover and the Government for construction or amendment of the Government decree. At a hearing on May 28, 1965 Judge Wyzanski declined to act on the ground of comity in view of the late stage of the case in the Middle District of Pennsylvania.

United contends with much force that Judge Wyzanski plainly indicated at the hearing his informal interpretation of the decree contrary to that of the court below. But whatever the parties may make of Judge Wyzanski's comments from the bench at that time, it was not until after the application was denied on May 28, 1965 that United, on June 9, 1965 in connection with its motion for a partial new trial applied for a certification by the court below to the District Court in Massachusetts of the questions relating to the effect of the Government decree.

We hold that in view of the untimeliness of the request for certification, its denial by the court below was not an abuse of discretion.

### Statute of Limitations

The suit was filed before the effective date of the amendment of July 7, 1955 creating a federal four year statute of limitations in antitrust actions (15 U.S.C. § 15b). The parties are agreed that by virtue of the applicable Pennsylvania statute and various tolling provisions[20] the

20. See 245 F.Supp. at 294, n. 15.

six-year period under the statute was extended backward so as to bar claims for conduct prior to July 1, 1939.

The contention now made, however, is that if there was a refusal by United to sell shoe machinery to Hanover, the injury occurred many years prior to 1939, in fact perhaps even before the present century, and hence all recovery is barred by the statute of limitations. This contention falls in view of our holding that the duty to sell established by the Government decree did not come into existence until 1946. Since the injury could not have occurred prior to 1946, Hanover's claim is well within the period of the statute of limitations.

## Damages

1. *The Damages Within the Allowable Period.*

The court below held that as a result of United's unlawful monopolization Hanover was required to pay more on the leases for the use of its shoe machinery than it would have been required to pay if the machinery had been available for sale in a free and competitive market. It held that as a result Hanover was damaged in the period from July 1, 1939 through September 21, 1955 in the amount of $1,413,203, which when trebled amounted to $4,239,609.

The damage period, as we have already seen, must be limited to commence on June 10, 1946. In the present state of the record it is not clear that the court below was justified in fixing the end of the damage period at the date of the institution of the action. Section 9 of the Government decree required United to present to the court before "B Day" a detailed plan for terminating all outstanding leases and for converting the lessees' rights to ownership

of the machines they then held. The plan was approved by Judge Wyzanski on June 1, 1955. The record shows that Hanover actually converted to ownership its previously leased machines sometimes in October, 1955.

In these circumstances, the damage period ended on June 1, 1955 for on that date the conversion from leasehold to ownership was available to Hanover and the unlawful lease-only policy had ended.[21]

Accordingly, no damages may be allowed for the period between June 1, and September 21, 1955,[21] or, as we have already determined, for the period prior to June 10, 1946. Since there is no division in the record of the damages for either of these two periods, it will be necessary to award a new trial on the issue of damages so that the proof may be broken down to show what damages, if any, were sustained during the allowable period.

A number of problems in the proof of damages which have been presented to us will recur on retrial. To the extent that it is possible to adjudicate them on the present record, it is desirable that we do so as a guide to the court below on the retrial.

2. *Cost of Capital.*

United contends that Hanover's so-called cost of capital should have been treated as an element of the cost of acquiring the machinery. The court below disallowed this item, which was defined as "the rate of return expected by investors on capital funds they place at . . . [a concern's] disposal," after hearing the conflicting testimony of expert economists called by each party. It found that "cost of

21. Of course, the credit for salvage value should be computed as of that date.

capital" is an economic concept which allows a company to decide if a certain investment is sound by computing the rate of return which will be required on that investment to justify expending funds on it rather than in an alternative investment, and that it is measured in terms of percentage of earnings per share of common stock to price per share, and of percentage of net profits after taxes to stockholders' equity. It also found that the measurement of cost of capital was vague and not susceptible of general agreement in its application and that in any event it was not a proper element in the calculation of damages but was only a guide to investment.

The novel concept which United sought to have approved has not yet reached the point of general acceptance even among economists. We agree with the court below that cost of capital is not sufficiently related to actual costs to be included in an antitrust damage calculation.

3. *Tax Benefits.*

The court below held that whatever tax advantages Hanover obtained by the leasing system could not be considered in reduction of the amount of Hanover's recovery. It did so on the grounds that generally in tort and breach of contract actions taxes are not considered in assessing damages[22] and that any recovery by Hanover would be subject to taxation. It relied upon Judge Goodrich's statement in the passing-on trial that whatever happens after the injury which permits an injured plaintiff to escape some of the consequences of the wrong done him does not inure to the benefit of the defendant.[23] It therefore held

22. Citing annotations in 63 ALR 2d 1393 and 1433.

23. 185 F.Supp. at 829.

that tax consequences to Hanover such as deductions for rents and royalties of lease machines and capital gains treatment for machines if owned and later sold were extraneous and were not to be considered.

In this we think the court below erred. What is involved here is not the tax on Hanover's recovery but rather the tax elements which would bear on Hanover's choice of purchasing rather than leasing the machinery it required. In making such a determination a business of any size necessarily must give consideration to the tax elements inherent in the two alternatives from which the choice must be made. It therefore was significant in determining whether Hanover, if it had been able to do so, would have purchased the machinery which it leased from United, to evaluate the respective tax consequences of purchase and of lease and their financial impact. Since these tax consequences are so inherently a part of the choice which would be made and since the court below has found that Hanover would have chosen to buy rather than lease the machinery, the award of damages should not exceed the difference between the two alternatives as Hanover itself would have computed it. The excess of one over the other of the two alternatives of purchase or lease should not be artificially inflated by ignoring the impact of taxation. We deal here not with subsequent tax effect on damages inflicted, but rather with damages resulting from the choice of one over another course of action in both of which the tax impact necessarily was a matter of contemporaneous consideration and significance. This is as realistic an element as the deduction which the court below required in order to reflect the fact that United serviced its machines as lessor, a duty which Hanover itself would have had to assume and pay

for if it had been the owner of the machines.[24] In the same way, if Hanover had owned rather than leased the machines it would not have had the benefit of tax deductions for the rental and royalty payments to United and would have been subject to capital gains tax on the sale of any machines it sold at more than depreciated book value. It would be a distortion of reality to permit Hanover to recover damages on the ground that it would have bought machinery if it had been allowed to do so, without requiring it to give credit in its calculation of its damages for the savings which accrued to it from the tax advantages it received under the leasing system it now disowns and without also requiring it to reflect in its costs of ownership the taxes which such dominion would have imposed.

Hanover's damages therefore must be diminished by permitting United to show the favorable tax consequences which Hanover obtained from leasing and the unfavorable consequences which would have flowed from ownership of the machinery. We do no more than require accuracy in the calculation of the relative financial cost of leasing compared to buying the machinery, which must include those elements which a business corporation would necessarily consider in choosing between the two alternatives.

### Hanover's Cross-Appeal

Hanover in its cross-appeal attacks the district court's exclusion from its recoverable damages of those damages attributable to the unavailability of the United Goodyear Outsole Rapid Lockstitch Machine ("ORL") for the period 1939-1955, which it claimed amounted to $324,356.[25]

24. See 245 F.Supp. at 287.

25. See 245 F.Supp. at 299, 302.

The court below excluded the item on the ground that another manufacturer's equipment, known as the Landis Stitcher, was available to Hanover and would have been satisfactory for its operations.[26] Hanover maintains that there is no evidence to support the conclusion that the Landis Stitcher was a satisfactory substitute for the ORL. It therefore seeks to have its damage judgment increased by threefold the amount of $324,356.

Even if Hanover's contention is correct, the present record does not permit an award of damages for this item. For the amount of $324,356 stretches over the period from 1939 to 1955 and we cannot allocate it within the allowable period beginning June 10, 1946 and ending June 1, 1955. This issue therefore must be remitted to the court below for reconsideration as part of the retrial on damages. When evidence has been taken on this question on retrial the record may well be different from what is now before us. In these circumstances, therefore, we shall not pass on the sufficiency of the present record to justify the conclusion that the Landis Stitcher could be used satisfactorily in Hanover's welt shoe manufacturing as a substitute for the ORL machine.

COUNSEL FEES

The court below allowed to Hanover an attorneys' fee of $600,000 for the services of New York counsel and $50,000 for the services of Pennsylvania counsel. United objects that the allowances are excessive.

The district court tested the reasonableness of the fees, especially to New York counsel, not only by the hours

26. 245 F.Supp. at 283.

devoted to the case, but also by the percentage of the recovery in its original and trebled amounts. See 245 F.Supp. at 303-4. Since the period for which damages may be awarded is now being reduced and a retrial will be held on damages, it will be for the court below to determine the reasonable fees which should be made to counsel in the light of whatever new award it may make on damages.

We will therefore vacate the award of counsel fees and order counsel fees to be redetermined in the light of whatever damages the court may find on the rehearing.

CONCLUSION

In United's appeal (Appeal No. 15626) the judgment of the court below will be vacated as to damages and a new trial will be awarded limited to damages, in accordance with this opinion; and the award of counsel fees in the amount of $600,000 for the services of Donovan Leisure Newton & Irvine and $50,000 for the services of Nogi, O'Malley & Harris will be vacated for further proceedings in accordance with this opinion.

In Hanover's appeal (Appeal No. 15627) the judgment will be vacated so that the issue therein raised may be reconsidered as part of the retrial of damages.

A True Copy:

Teste:

*Clerk of the United States Court of Appeals for the Third Circuit.*

## Supplemental Opinion of the Court

(Filed May 18, 1967)

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

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No. 15626

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THE HANOVER SHOE, INC.,

*v.*

UNITED SHOE MACHINERY CORPORATION,

*Appellant.*

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No. 15627

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THE HANOVER SHOE, INC.,

*Appellant,*

*v.*

UNITED SHOE MACHINERY CORPORATION.

---

Before: FORMAN, GANEY and FREEDMAN, *Circuit Judges*

FREEDMAN, *Circuit Judge:*

---

Only one argument made in the petitions for rehearing calls for further comment. United argues in its petition, as it did before us, that the statute of limitations completely bars Hanover's claim for damages. Both parties had conceded at trial that the applicable six-year Pennsylvania statute of limitations had been extended backward by various tolling provisions to allow recovery of all damages incurred after 1939. We reduced the period of allowable

damages to one beginning in 1946, when the *American Tobacco* case was decided, and we did not reach United's contention regarding the statute of limitations, because we reasoned that since United's conduct did not become illegal until 1946, Hanover's cause of action for damages could not have arisen any earlier.

United now argues that the statute of limitations began to run in 1912 or even earlier, when it first refused to sell its machinery, and that the statute was not tolled simply because the conduct which caused the injury was legal under the precedents of that time.[1] This, however, does not require a different result in this case, for United has misconceived the basic nature of Hanover's claim for damages.

United argues that where a refusal to deal causing damages has occurred well before the allowable period under the statute of limitations, no recovery may be had, even for damages following the reiteration of such a refusal to deal within the statutory period.[2] The cases relied on,

1. For this United cites Marreo Morales v. Bull Steamship Co., 279 F.2d 299 (1 Cir. 1960); Versluis v. Town of Haskell, 154 F.2d 935 (10 Cir. 1946).

2. For this United cites Garelick v. Goerlich's, Inc., 323 F.2d 854 (6 Cir. 1963); Peto v. Madison Square Garden Corp., 1965 Trade Cases ¶ 71,398 (S.D.N.Y. 1965); Sherman v. Goerlich's Inc., 238 F.Supp. 728 (E.D.Mich. 1963), aff'd, 341 F.2d 988 (6 Cir. 1965), cert. denied, 382 U.S. 830 (1965); Norman Tobacco & Candy Co., Inc. v. Gillette Safety Razor Co., 197 F.Supp. 333 (N.D.Ala. 1960), aff'd, 295 F.2d 362 (5 Cir. 1961); Emich Motors Corp. v. General Motors Corp., 1955 Trade Cases ¶ 67,960 (N.D.Ill. 1955), aff'd, 229 F.2d 714 (7 Cir. 1956). See also Steiner v. 20th Century-Fox Film Corp., 232 F.2d 190 (9 Cir. 1956); The Campbell Distributing Co. v. Jos. Schlitz Brewing Co., 208 F.Supp. 523 (D.Md. 1962); Gaetzi v. Carling Brewing Co., 205 F.Supp. 615 (E.D.Mich. 1962); Farbenfabriken Bayer, A.G. v. Sterling Drug, Inc., 153 F.Supp. 589 (D.N.J. 1957), aff'd, 307 F.2d 210 (3 Cir. 1962), cert. denied, 372 U.S. 929 (1963).

however, are very different from the present case. First, they are antitrust conspiracy cases in which the plaintiff sought to recover damages for the full period both within and outside the statute of limitations, on the claim that the statute did not begin to run until the termination of the conspiracy. Here, however, Hanover does not seek to recover the damages it suffered before 1939; it concedes that any claims it had for conduct in that period are now barred and seeks only to recover for damages inflicted after 1939. Secondly, on the facts in the cases cited by United it would have been difficult to segregate damages which flowed from the original refusal to deal from damages attributable to the continued refusals within the statutory period. On the other hand, the specific collection of rentals every month within the statutory period provides a concrete standard for the measurement of the damages which occurred here within the statutory period by comparing the rentals with the reasonable sales value of the machinery.[3] Finally, in the cited cases the continuing conduct was that of a mere re-assertion of the refusal to deal. Here, however, United went beyond a mere continuation of the refusal to sell; it collected rentals on leases and entered into new leases when old machinery was no longer in working condition and required replacement.

The rule applicable to the facts in this case is that where the repeated and measurable invasion of a plaintiff's rights occurs both outside the statutory period and also within it, the fact that some of the injury and damage occurred outside the statutory period does not affect the

3. The Muskin Shoe Co. v. United Shoe Machinery Corp., 167 F.Supp. 106 (D.Md. 1958), which found a similar measure too complex, was specifically rejected by Chief Judge Sheridan, and we agree that it should not be followed. See 245 F.Supp. at 295-96.

plaintiff's right to recover for the separate invasion of its rights which occurred within the period.[4] Indeed, any other rule would be an affront to reason, for it would require the conclusion that injury and damages which were inflicted, as in this case, in 1955, by concrete and specific business transactions, were barred by the statute of limitations as long ago as 1918 or even earlier, because of similar but not identical conduct. The policy of the statute of limitations is maintained by allowing recovery for measurable injury within the period and barring recovery for injury beyond it. The operative facts underlying Hanover's claim occurred within the statutory period as tolled, and the traditional concern regarding lost witnesses and fading memories is thus fully satisfied. Moreover, we effectuate the general policy against stale claims in barring injury suffered before 1946. In so doing, however, we see no need to wipe out Hanover's current claim.[5]

A True Copy:

Teste:

*Clerk of the United States Court of Appeals for the Third Circuit.*

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4. Highland Supply Corp. v. Reynolds Metals Co., 327 F.2d 725 (8 Cir. 1964); Roosevelt Raceway, Inc. v. Universal Controls, Inc., 1965 Trade Cases ¶ 71,565 (E.D.N.Y. 1965); Susser v. Carvel Corp., 206 F.Supp. 636 (S.D.N.Y. 1962), aff'd 332 F.2d 505 (2 Cir. 1964), cert. dismissed, 381 U.S. 125 (1965); Cardinal Films, Inc. v. Republic Pictures Corp., 148 F.Supp. 156 (S.D.N.Y. 1957).

5. See Daniels v. The Beryllium Corp., 227 F.Supp. 591 (E.D.Pa. 1964) and 211 F. Supp. 452 (E.D.Pa. 1962), where recovery was permitted for the aggravation of an illness during the statutory period, although relief for the original injury was held barred by the statute of limitations.

## APPENDIX A

## Opinion of the Court

(Filed May 18, 1967)

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

---

No. 15626

---

THE HANOVER SHOE, INC.

*v.*

UNITED SHOE MACHINERY CORPORATION,

*Appellant*

---

No. 15627

---

THE HANOVER SHOE, INC.

*Appellant,*

*v.*

UNITED SHOE MACHINERY CORPORATION

ON PETITIONS FOR REHEARING BY UNITED SHOE MACHINERY CORPORATION AND THE HANOVER SHOE, INC.

---

Before STALEY, *Chief Judge*, MCLAUGHLIN, KALODNER, HASTIE, FORMAN, GANEY, SMITH, FREEDMAN, and SEITZ, *Circuit Judges*.

PER CURIAM:

The petitions for rehearing are denied.

A True Copy:

Teste:

*Clerk of the United States Court of Appeals for the Third Circuit.*

## APPENDIX B

## Order Amending Judgment and Amended Judgment

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

---

No. 15626

---

THE HANOVER SHOE, INC.

*v.*

UNITED SHOE MACHINERY CORPORATION,

*Appellant*

---

No. 15627

---

THE HANOVER SHOE, INC.

*v.* *Appellant,*

UNITED SHOE MACHINERY CORPORATION

---

Present: Forman, Ganey, and Freedman, *Circuit Judges*

ORDER AMENDING JUDGMENT

The judgment in these appeals is hereby amended by striking out the award of costs to each appellant and by providing in lieu thereof that in each appeal the amount of attorneys fees in the prosecution, briefing and arguing of the appeal shall be determined by the district court as part of the retrial of the issue of damages, and that the costs on this appeal shall abide the ultimate decision in this action.

By the Court,

ABRAHAM L. FREEDMAN

.....

Circuit Judge

Date: June 7, 1967

*Order Amending Judgment and Amended Judgment*

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 15626

THE HANOVER SHOE, INC.

*v.*

UNITED SHOE MACHINERY CORPORATION,

*Appellant*

No. 15627

THE HANOVER SHOE, INC.

*Appellant,*

*v.*

UNITED SHOE MACHINERY CORPORATION

(D. C. Civil No. 5395)

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

Present—FOREMAN, GANEY and FREEDMAN, *Circuit Judges.*

AMENDED JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Middle District of Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that in United's appeal (No. 15,626) the judgment of the District Court, filed August 13, 1965,

be, and the same is hereby vacated as to damages and a new trial is awarded limited to damages, in accordance with the opinion of this Court; and the award of counsel fees in the amount of $600,000 for the services of Donovan Leisure Newton & Irvine and $50,000 for the services of Nogi, O'Malley & Harris be and hereby is vacated for further proceedings in accordance with the opinion of this Court; in Hanover's appeal (No. 15,627) the judgment of the District Court, filed August 13, 1965, be, and the same is hereby vacated so that the issue therein raised may be reconsidered as part of the retrial of damages. The amount of attorneys fees in the prosecution, briefing and argument of each of these appeals shall be determined by the District Court as part of the retrial of the issue of damages, and the costs on these appeals shall abide the ultimate decision in this action.

ATTEST:

THOMAS F. QUINN
Clerk

June 7, 1967

## APPENDIX B

## Order Denying Rehearing

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

---

No. 15626

THE HANOVER SHOE, INC.

*v.*

UNITED SHOE MACHINERY CORPORATION,

*Appellant*

---

No. 15627

---

THE HANOVER SHOE, INC.

*Appellant,*

*v.*

UNITED SHOE MACHINERY CORPORATION

SUR PETITION FOR REHEARING

Present—Staley, Chief Judge, McLaughlin, Kalodner, Hastie, Forman, Ganey, Smith, Freedman and Seitz, Circuit Judges.

The petitions for rehearing filed by The Hanover Shoe, Inc. and United Shoe Machinery Corporation in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision

*Order Denying Rehearing*

having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petitions for rehearing are denied.

By the Court,
ABRAHAM L. FREEDMAN

.....
Judge

Dated: May 18, 1967

## APPENDIX C

### Statutes

15 U.S.C.A. § 2 Monopolizing trade a misdemeanor; penalty

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court. July 2, 1890, c. 647, § 2, 26 Stat. 209; July 7, 1955, c. 281, 69 Stat. 282.

15 U.S.C.A. § 16 Judgment in favor of Government as evidence; suspension of limitations

(a) A final judgment or decree heretofore or hereafter rendered in any civil or criminal proceeding brought by or on behalf of the United States under the antitrust laws to the effect that a defendant has violated said laws shall be prima facie evidence against such defendant in any action or proceeding brought by any other party against such defendant under said laws or by the United States under section 15a of this title, as to all matters respecting which said judgment or decree would be an estoppel as between the parties thereto; *Provided,* That this section shall not apply to consent judgments or decrees entered before any testimony has been taken or to judgments or decrees entered in actions under section 15a of this title.

*Statutes*

15 U.S.C.A. § 15 Suits by persons injured; amount of recovery

Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee. Oct. 15, 1914, c. 323, § 4, 38 Stat. 731.

SUPREME COURT, U. S.

AUG. 7 1967

JOHN F. DAVIS, CLERK

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1967

No. 335

THE HANOVER SHOE, INC.,
*Petitioner,*

*v.*

UNITED SHOE MACHINERY CORPORATION,
*Respondent.*

## BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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# INDEX


| | PAGE |
|---|---|
| QUESTIONS PRESENTED | 2 |
| STATEMENT OF THE CASE | 3 |
| REASONS FOR DENYING THE WRIT | 5 |
| CONCLUSION | 13 |


## TABLE OF CASES


| | |
|---|---|
| *American Construction Co.* v. *Jacksonville, Tampa and Key West Ry.*, 148 US 372 | 5, 7 |
| *American Tobacco Co.* v. *United States*, 328 US 781 | 4, 11 |
| *Arnold* v. *United States for the Use of W. B. Guimarin & Co.*, 263 US 427 | 5 |
| *Beacon Theaters Inc.* v. *Westover*, 359 US 500 | 8 |
| *Commissioner* v. *Glenshaw Glass Co.*, 348 US 426 | 9 |
| *Hamilton-Brown Shoe Co.* v. *Wolf Brothers & Co.*, 240 US 251 | 5, 7 |
| *Martinez* v. *International Banking Corp.*, 220 US 214 | 5, 7 |
| *McFarland* v. *Brown*, 184 US 239 | 5 |
| *United Shoe Machinery Corp.* v. *United States*, 258 US 451 | 9 |
| *United States* v. *United Shoe Machinery Corp.*, 110 F. Supp. 295 (D. Mass. 1953), aff'd 347 US 527 | 3, 5, 9-11, 12 |
| *United States* v. *United Shoe Machinery Corp.*, 247 US 32 | 9 |
| *United States* v. *Winslow*, 227 US 202 | 9 |
| *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 US 479 | 8 |

## STATUTES AND OTHER AUTHORITIES

PAGE

Robertson & Kirkham, *Jurisdiction of the Supreme Court of the United States*, § 130, pp. 232-33 (Wolfson & Kurland, 1951) ..... 7

Rules of the Supreme Court of the United States:

Rule 19 ..... 2

Stern & Gressman, *Supreme Court Practice*, § 4-19, p. 148 (1962) ..... 7, 8

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1967

No. 335

THE HANOVER SHOE, INC.,
*Petitioner,*

*v.*

UNITED SHOE MACHINERY CORPORATION,
*Respondent.*

## BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Respondent-defendant United Shoe Machinery Corporation ("United") opposes the petition of The Hanover Shoe, Inc. ("Hanover") for certiorari to review the decision of the United States Court of Appeals for the Third Circuit. The Court of Appeals affirmed in part and reversed in part the judgment of the District Court (Sheridan, C.J.) and remanded the action to the District Court for further trial. Should the Court grant Hanover's petition herein at the present interlocutory stage of the proceeding, we submit the Court should have fully before it the errors which United asserts to have been made and to be the proper subject of review on certiorari. Accordingly, in No. United has cross-petitioned for a writ of certiorari, to be granted only in the event the Court grants the petition in No. 335.

Hanover's petition herein fails to state a case appropriate for certiorari under Rule 19 at this time because—

(a) The case at this stage lacks finality;

(b) The "Questions Presented", (Pet. 2-3) are unique and of no general applicability and were correctly decided by the Court of Appeals in the aspects as to which Hanover seeks review;

(c) Independent grounds requiring dismissal of the entire action (as outlined in United's cross-petition for certiorari in No. ) render unnecessary review of the different issues raised in Hanover's petition.

**Questions Presented**

1. Have sufficiently extraordinary grounds been asserted to warrant this Court's exercise of discretionary certiorari jurisdiction where the Court of Appeals has remanded issues to the District Court for further trial and where questions of law have not yet been passed on by the Court of Appeals itself?

2. Have special and important reasons been adequately shown to warrant review of the Court of Appeals' decision that in determining the amount of damage to Hanover resulting from its having leased shoe machinery rather than having purchased it the tax consequences of the alternative means of acquisition must be taken into account?

3. Have special and important reasons been adequately shown to warrant review of the Court of Appeals' decision that the Government decree entered in 1953 which is the basis of Hanover's action should be given retroactive effect only to June, 1946 because prior to that time United's leasing policy was, in the opinion of that court as well as

the judge who entered the decree, "manifestly pursued in the shelter of Supreme Court approval" and in the "absence of predatory practices"?

4. Should certiorari be granted on Hanover's petition where independent grounds exist for dismissal of the entire action?

## Statement of the Case

Continuously from at least 1912 until 1955 plaintiff shoe manufacturer, Hanover, and defendant shoe machinery manufacturer, United, had transactions in shoe machinery manufactured by United and distributed on lease to Hanover for use in the manufacture by it of men's and boys' shoes (6a-7a).* The complaint herein charged United with monopolization of the shoe machinery industry since 1912 and claimed damages by virtue of alleged excessive lease charges and inability to acquire shoe machinery by purchase (11a, 19a). Hanover's action is based on a decree entered in 1953 by the United States District Court for Massachusetts (Wyzanski, J.) in a Government antitrust case against United, which adjudicated monopolization of the shoe machinery business by United. *United States* v. *United Shoe Machinery Corp.*, 110 F. Supp. 295 (D. Mass. 1953), aff'd 347 US 527.

The District Court in the instant case entered judgment for Hanover in the amount of $4,239,609, representing treble damages, with interest, and in addition $650,000 attorneys' fees (873a). The basis of the decision was that Hanover would during the damage period have purchased

*Such references are to pages of United's Appendix in the Court of Appeals, filed in this Court together with Hanover's petition herein.

instead of leased the United machinery which it used in its factories and that, although the lease charges were reasonable, the difference between the aggregate lease charges for the machines in question during the damage period and the price for which the Court calculated Hanover could have bought the machines if offered for sale was $1,413,203 (748a-750a, 859a), which amount was then trebled. In the calculation of this amount the District Court excluded three United machines which Hanover leased from United but which the court found could have been substituted for by comparable machines of non-United manufacture, the principal of these being United's Goodyear Outsole Rapid Lockstitch Machine ("ORL") for which plaintiff claimed damages in the amount of $324,326 (800a, 859a). The District Court permitted recovery for the period July 1, 1939 through September 21, 1955 (800a) the first date being fixed by the Court's view of the inception of the Pennsylvania statute of limitations and the latter by the filing of the complaint herein.

On appeals by both parties the Court of Appeals vacated the judgment and directed a new trial as to damages and counsel fees. The Court of Appeals agreed in part with United's claim that the decree adverse to it in the Government antitrust suit should not be retroactively applied and held that in light of "the approval of its leasing policy in various forms by three successive decisions of the Supreme Court" (Pet. 22a) United was justified in its business practices as to the leasing of shoe machinery up to the date in 1946 when this Court approved Judge Learned Hand's holding in the *Alcoa* case (*American Tobacco Co.* v. *United States,* 328 US 781, 811-15) and confined damages to the period commencing at that time. The Court of Appeals also held that the damage period should end not at the date of filing of the complaint herein but on June 1, 1955 when conversion from leasehold to

ownership of the United machines first became possible by reason of Judge Wyzanski's approval of the appropriate plan under the decree. In addition, the Court of Appeals reversed the trial court for its failure to take into account the tax advantages of leasing for the purpose of comparing ownership cost with lease cost, holding that inclusion of such tax factors was essential to a fair comparison of the two methods of acquisition. The Court of Appeals did not pass on the award of $650,000 attorneys' fees but, noting that such award had been based not simply on hours devoted to the case but also on the recovery award, vacated the award for further proceedings in accordance with its opinion relating to the damage period.

On Hanover's appeal from the exclusion of United's ORL machine from the damage calculation by virtue of the availability of another, non-United stitcher, the Court of Appeals deferred decision and remanded the issue for reconsideration as part of the retrial damages.

Petitions for rehearing by both parties were denied, with a further opinion by the Court of Appeals explaining its ruling on the statute of limitations (Pet. 34a-38a).

**Reasons for Denying the Writ**

1. There is no showing of the extraordinary circumstances essential to warrant exercise of certiorari jurisdiction in the absence of a final judgment. *Hamilton-Brown Shoe Co.* v. *Wolf Brothers & Co.*, 240 US 251, 258; *American Construction Co.* v. *Jacksonville, Tampa and Key West Ry.*, 148 US 372, 384. The non-finality of the judgment of the Court of Appeals is settled by decisions of this Court. *Arnold* v. *United States for the Use of W. B. Guimarin & Co.*, 263 US 427; *Martinez* v. *International Banking Corp.*, 220 US 214; *McFarland* v. *Brown*, 187 US 239.

The very issues upon which Hanover seeks review—the extent of retroactivity to be given the Government decree in light of Supreme Court decisions concerning United's operations, and the propriety of taking tax factors into account in computing damages—have been remanded to the District Court for final determination. The legal aspects of these two issues have been adjudicated, but the amount of the tax benefits to be reflected and the amount of damages so computed which is allocable to the shorter period remain to be determined.

Moreover, certain legal issues are as yet unresolved and will remain unresolved even by the Court of Appeals regardless of the action taken by this Court on certiorari or on the merits. The Third Circuit expressly reserved decision on the allowability of damages for the unavailability of the ORL machine until completion of the new trial (Pet. 31a-32a). This item the District Court excluded from its damage award because the competitive Landis Stitcher was comparable and available (245 F. Supp. at 283). As the Court of Appeals said (Pet. 32a):

> "When evidence has been taken on this question on retrial the record may well be different from what is now before us. In these circumstances, therefore, we shall not pass on the sufficiency of the present record to justify the [District Court's] conclusion . . . ."

In addition, the Court of Appeals has declined to pass on the $650,000 attorneys' fee award in light of the new trial ordered, at which such award, based as it is to some extent on a "percentage of the recovery in its original and treble amounts", presumably will be reduced in conjunction with the reduction of damages (Pet. 32a-33a). Indeed, if review were granted and the judgment below affirmed, the

Court of Appeals would still have the additional task of examining the total damage award after the retrial, which in the Court's own view will raise a "number of problems" (Pet. 28a), in light of its instructions to the trial court.

As to what constitutes a final judgment the Court has stated:

> "It follows that although the Appellate Court fixed the rights and liabilities of the parties, it in effect referred a question in the case to the subordinate court for further judicial action; hence the judgment was not final for the purpose of an appeal or writ of error. . . . . Until, therefore, the trial court by its judgment ascertains and fixes the actual indebtedness of the plaintiff and complies with the other directions contained in the mandate it cannot be said that a final decree has been entered in the cause." *Martinez* v. *International Banking Corp.*, 220 US 214, 223.

In the case at bar not only have questions been referred to the subordinate court requiring further judicial action, but the rights and liabilities of the parties remain to be fixed. Thus the lack of finality is more apparent in the case at bar than in the *Martinez* case.

Such piecemeal review should be avoided except in extraordinary circumstances. *American Construction Co.* v. *Jacksonville, Tampa and Key West Ry.*, 148 US 372, 384. It has been stated that "the fact that the decree sought to be reviewed is not final may, of itself, furnish sufficient ground for denial" of the petition for certiorari. Robertson & Kirkham, *Jurisdiction of the Supreme Court of the United States*, § 130, pp. 232-33 (Wolfson & Kurland, 1951). Accord, *Hamilton-Brown Shoe Co.* v. *Wolf Brothers & Co.*, 240 US 251, 258; Stern & Gressman, *Supreme Court Practice*, § 4-19, p. 148 (1962).

Extraordinary circumstances warranting review of non-final judgments have been found in issues of pressing public importance, such as the seizure of the steel mills during the Korean War (*Youngstown Sheet & Tube Co.* v. *Sawyer,* 343 US 579), issues of broad fundamental application, such as the right to jury trial (*Beacon Theaters Inc.* v. *Westover,* 359 US 500), or issues fundamental to the further conduct of the litigation (Stern & Gressman, *op. cit. supra,* pp. 148-50). The issues on which Hanover seeks review are of no such character. As will be shown herein, both the tax benefit and the damage period issues are unique to this action and of no general application. Moreover, both can be more readily disposed of after final judgment. Should it choose at that time to grant review and reverse the Court of Appeals, this Court would need only to reinstate the findings at the first trial on those very issues.

2. The aspects of the Court of Appeals' decision which Hanover seeks to have reviewed not only are wholly lacking in importance or general applicability but also are correctly decided.

On the issue whether damages should reflect the tax consequences of purchasing and leasing, the Court of Appeals properly recognized that by owning its shoe machines Hanover would have lost the benefit of the tax deduction for lease and royalty payments to United and would have incurred capital gains taxes on the sale of the machines owned. This seems an obvious point—one which elementary fairness would require to be taken into account if a court is to determine whether in fact Hanover sustained a greater cost in renting its machines from United than it would have sustained if it had purchased them from United.

The sophistry of Hanover's contention is reflected in its misstatement at page 9 of its petition that "the Court of Appeals required Hanover to deduct from its computa-

tion of damages the difference between the tax consequences to it of leasing machinery from the wrongdoer and ownership in a free and open market during the damage period." We do not urge that income taxes be deducted *after* the proper figure has been stated for the damage calculation. What we do urge and what the Court of Appeals has recognized is that the saving on income taxes which Hanover accomplished by taking the annual rentals and royalties as deductions year by year must be taken into account in order to determine whether Hanover did in fact sustain any damage at all and, if so, to what extent.

Hanover attempts to fabricate an "important question of federal law" and even a "difference between circuits" out of *Commissioner* v. *Glenshaw Glass Co.*, 348 US 426, and the decisions of various Courts of Appeals cited in the footnote on pages 11-12 of the petition. *Glenshaw Glass* simply stands for the proposition that a treble damage antitrust recovery constitutes gross income in its entirety under the Internal Revenue Code. Thus, Hanover's recovery will be taxable in its entirety. In none of the Court of Appeals decisions cited on pages 11-12 were taxes relevant to a determination of pecuniary loss. Moreover, the Seventh, Eighth and Ninth Circuit decisions cited by Hanover refute its position by recognizing the expenses that would have been incurred on the hypothesis of no antitrust violations. None of them involves the unique theory of recovery predicated on the difference of cost between leasing machinery and buying machinery—or any analogous theory.

As to the extent of retroactivity to be given the Government decree, that issue must be considered in light of the three earlier decisions of this Court specifically involving United* which were responsible for the nature of the

**United Shoe Machinery Corp.* v. *United States*, 258 US 451; *United States* v. *United Shoe Machinery Corp.*, 247 US 32; *United States* v. *Winslow*, 227 US 202.

decree Judge Wyzanski entered in 1953 in the Government action, which decree forms the very basis of the instant private treble damage suit by Hanover.

In the courts below it was urged by Hanover and denied by United that such decree condemned United's lease-only policy and also should be applied retroactively. The Court of Appeals based its limitation on the retroactive application sought by Hanover on the views expressed by Judge Wyzanski, who was the author of the decree on which Hanover relied (Pet. 20a-22a):

> "Judge Wyzanski made vividly clear the extraordinary position of United in regard to the antitrust laws. Three times, in 1913, in 1918 and in 1922, United had been under the scrutiny of the Supreme Court."
>
> * * * * *
>
> "In Judge Wyzanski's words: 'What United is now doing is similar to what it was then doing, but the activities which were similar stood uncondemned,—indeed, one ought to go further and say they were in part endorsed.' 110 F.Supp. at 348. He held that the last two cases still had enough vitality to prevent his holding, as he otherwise would, that United had violated § 1 of the Sherman Act by its lease-only practice."
>
> * * * * *
>
> "Judge Wyzanski stressed the absence in United's conduct of predatory practices, which the decisions prior to *Alcoa* had emphasized as an element in monopolization. He held that United's conduct now ran afoul, however, of § 2 under the *Alcoa* doctrine, which brought within its prohibition monopolization attained by conduct which although

> 'honestly industrial' cannot be said to render market control, which is inherently evil, an economically inevitable result, for in such a case it cannot be said of a defendant that greatness was thrust upon him. 110 F.Supp. at 341-42. In so finding, however, Judge Wyzanski said: '. . . Probably few monopolies could produce a record so free from any taint of that kind of wrongdoing.' 110 F.Supp. at 345."

In light of Hanover's reliance on Judge Wyzanski's decree and the latter's view of the earlier legality of United's operations under this Court's three decisions, the Court of Appeals properly refused to permit Hanover to extrude from the decree any treble damage recovery for the period prior to 1946 (Pet. 22a-23a). The court held it erroneous to base damages on that earlier period when, as recognized by Judge Wyzanski, United's operations were "manifestly pursued in the shelter of Supreme Court approval" and in the "absence of predatory practices". (*Ibid.*) By arguing that the damage period has been improperly cut off Hanover has put the cart before the horse. As the Court of Appeals and Judge Wyzanski recognized, but for the *Alcoa* and *American Tobacco* decisions there would be no violation whatsoever in light of the Supreme Court approval of United's operations.

Not only was the decision below in this regard clearly correct so far as it went but the question here raised by Hanover is wholly unique. The real issue is not whether the Court of Appeals should have pushed the decree back prior to 1946 to give further benefit to Hanover but whether the court instead should have determined that the decree did not adjudicate that United's lease-only policy violated the antitrust laws and should have refused to give the

decree any retroactive effect, in light of the presentation below and in United's cross-petition in No.

3. Denial of certiorari is further justified by the existence of independent grounds for dismissal of the entire action.

As is set forth in greater detail in United's cross-petition for certiorari (No. ), the following constitute a bar to Hanover's recovery: (1) Judge Wyzanski's decree did not find an antitrust violation in respect of United's failure to sell shoe machines prior to the decree; (2) Judge Wyzanski recognized that to the extent there was illegality it resulted from a change in the law and his decree was intended to have prospective effect only; (3) the trial court improperly refused on United's motion to certify to Judge Wyzanski the question of what he intended by his own decree; (4) the recognition by both lower courts that the leases between United and Hanover were legal and the lease charges reasonable bars recovery by Hanover; (5) the courts below improperly excluded cost of capital from the comparison of the expense of ownership with the expense of leasing to determine damages, and its inclusion not only would have eliminated damages but would have demonstrated that leasing was more economical than purchasing; (6) Hanover's full recoupment of the machinery lease charges in its sale prices for shoes eliminated all possibility of legal injury; (7) Hanover neither asked to buy the shoe machines nor protested its inability to buy them and the absence of demand bars recovery; and (8) on the trial court's hypothesis that United's lease-only policy was illegal from the inception of relations between the parties in or before 1912, the applicable six-year statute of limitations expired long before the action was commenced in 1955.

Under the circumstances, therefore, interlocutory review of the two unique and far less substantial issues raised by Hanover is especially inappropriate.

## Conclusion

For the reasons stated above, the petition should be denied.

Dated: New York, New York
August 4, 1967

Respectfully submitted,

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FILED
NOV 24 1967
JOHN F. DAVIS, CLERK

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1967

No. 335

THE HANOVER SHOE, INC.,

*Petitioner,*

v.

UNITED SHOE MACHINERY CORPORATION,

*Respondent.*

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS
FOR THE THIRD CIRCUIT

## BRIEF FOR PETITIONER THE HANOVER SHOE, INC.

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# INDEX


| | PAGE |
|---|---|
| Opinions Below | 1 |
| Jurisdiction | 2 |
| Statutes Involved | 2 |
| Questions Presented | 3 |
| Statement of the Case | 4 |
| Summary of Argument | 7 |
| Argument | 11 |
| I—The Court of Appeals erred in requiring the District Court to reduce its damage calculations by whatever income tax reduction Hanover may have derived during the damage period as a result of leasing shoe machinery, as compared with the tax reduction it might have derived on the assumption—contrary to fact—that it had been able to buy shoe machinery, with the results that (a) the wrongdoer United is benefited at the expense of Hanover by the reduction of the damages payable by United and Hanover is twice subjected to taxes: (1) in the calculation of its damages and (2) when it again pays taxes on the recovery from which taxes have already been deducted in the damage calculations, and (b) contrary to Congressional policy Hanover is denied the damages it has sustained | 11 |
| II—The Court of Appeals erred in holding that United had monopolized the shoe machinery industry only after June 10, 1946, the date of the decision of this Court in *American Tobacco Co.* v. *United States*, 328 U.S. 781 and that its conduct, though the same both before and after that date, had been lawful prior to that date with the result that Hanover might not recover | |

PAGE

damages through the full period of the applicable statute of limitations from July 1, 1939 through June 1, 1955 but that instead its damage claim must be cut off on June 10, 1946 because the decision in *American Tobacco* should not be given retroactive application in a later treble damage antitrust case ..... 24

Conclusion ..... 41

## TABLE OF CASES

*A. C. Becken Co.* v. *Gemex Corp., aff'd,* 314 F.2d 839 (7th Cir.), *cert. den.,* 375 U.S. 816 (1963) ..... 20

*American Tobacco Co.* v. *United States,* 328 U.S. 781 (1946) ..... 4, 7, 8, 9, 24, 25, 26, 27, 28, 29, 31, 32, 33, 40

*Bauer & Cie* v. *O'Donnell,* 229 U.S. 1 (1913) ..... 40

*Cereal Byproducts Co.* v. *Hall,* 16 Ill. App. 2d 79, 147 N.E. 2d 383 (1958) ..... 17

*Charles Rubenstein, Inc.* v. *Columbia Pictures Corp.,* 176 F. Supp. 527 (D. Minn. 1959), *aff'd,* 289 F.2d 418 (8th Cir. 1961) ..... 20

*City of Atlanta* v. *Chattanooga Foundry and Pipe-works,* 127 Fed. 23 (6th Cir. 1903) ..... 21

*Commissioner of Internal Revenue* v. *Glenshaw Glass Co.,* 348 U.S. 426 (1955) ..... 4, 7, 13, 14, 18

*Emich Motors Corp.* v. *General Motors Corp.,* 340 U.S. 558 (1951) ..... 22

*Flintkote Co.* v. *Lysfjord,* 246 F.2d 368 (9th Cir. 1957) ..... 21

*Hanover Shoe, Inc.* v. *United Shoe Machinery Corp.,* 185 F. Supp. 826 (M.D. Pa.), *aff'd,* 281 F.2d 481 (3d Cir.), *cert. den.,* 364 U.S. 901 (1960) ..... 7, 8, 16

*International Harvester Co.* v. *Missouri,* 234 U.S. 199 (1914) ..... 29

*Lawlor* v. *National Screen Service Corp.,* 349 U.S. 322 (1955) ..... 21

PAGE

*Mandeville Island Farms, Inc.* v. *American Crystal Sugar Co.*, 334 U.S. 219 (1948) ..... 21

*North Texas Producers Assn.* v. *Metzger Dairies*, 348 F.2d 189 (5th Cir. 1965), *cert. den.*, 382 U.S. 977 (1966) ..... 19, 20

*Radovich* v. *National Football League*, 352 U.S. 445 (1957) ..... 21

*Simpson* v. *Union Oil Co.*, 377 U.S. 13 (1964) ..... 31, 32

*Southern Pacific Co.* v. *Darnell-Taenzer Lumber Co.*, 245 U.S. 531 (1918) ..... 19

*Standard Oil Co.* v. *United States*, 221 U.S. 1 (1911) 29

*Standard Sanitary Mfg. Co.* v. *United States*, 226 U.S. 20 (1912) ..... 29, 39

*Sterling Nelson & Sons, Inc.* v. *Rangen, Inc.*, 235 F. Supp. 393 (D. Idaho 1964), *aff'd*, 351 F.2d 851 (9th Cir. 1965), *cert. den.*, 383 U.S. 936 (1966) ..... 20

*Stokes* v. *United States*, 144 F.2d 82 (2d Cir. 1944) .... 16

*Straus* v. *Victor Talking Machine Co.*; 243 U.S. 490 (1917) ..... 40

*Straus* v. *Victor Talking Machine Co.*, 297 Fed. 791 (2d Cir. 1924) ..... 18, 20, 39

*Twentieth Century-Fox Film Corp.* v. *Brookside Theatre Corp.*, 194 F.2d 846 (8th Cir.), *cert. den.*, 343 U.S. 942 (1952) ..... 18

*Union Carbide and Carbon Corp.* v. *Nisley*, 300 F.2d 561 (10th Cir. 1961), *appeal dismissed*, 371 U.S. 801 (1962) ..... 20

*United Shoe Machinery Corp.* v. *United States*, 258 U.S. 451 (1922) ..... 10, 34, 35, 36

*United States* v. *Aluminum Co. of America*, 148 F.2d 416 (2d Cir. 1945) ..... 9, 29, 32

*United States* v. *General Electric Co.*, 272 U.S. 476 (1926) ..... 31, 32

*United States* v. *Grinnell Corp.*, 384 U.S. 563 (1966) 30

*United States* v. *International Harvester Co.*, 274 U.S. 693 (1927) ..... 30

*United States* v. *Patten*, 187 Fed. 664 (S.D.N.Y. 1911) ..... 29, 33

*United States* v. *Reading Co.*, 253 U.S. 26 (1920) ..... 29

PAGE

*United States* v. *Southern Pacific Co.*, 259 U.S. 214 (1922) ..... 29
*United States* v. *Swift & Co.*, 286 U.S. 106 (1932) ..... 9, 30
*United States* v. *Union Pacific R. Co.*, 226 U.S. 61 (1912) ..... 29
*United States* v. *United Shoe Machinery Corp.*, 234 Fed. 127 (E.D. Mo. 1916) ..... 37, 38
*United States* v. *United Shoe Machinery Corporation*, 247 U.S. 32 (1918) ..... 10, 36
*United States* v. *United Shoe Machinery Corporation*, 110 F. Supp. 295 (D. Mass. 1953), *aff'd per curiam*, 347 U.S. 521 (1954) ..... 24, 25, 31, 34, 38
*United States* v. *United States Steel Corp.*, 251 U.S. 417 (1920) ..... 30
*United States* v. *Winslow*, 227 U.S. 202 (1913) ..... 10, 33, 36

**Statutes:**

Clayton Act (38 Stat. 731, 15 U.S.C.A.):
Section 4 ..... 3, 5, 8, 13, 14, 22, 24

Clayton Act (38 Stat. 731; 69 Stat. 283; 15 U.S.C.A. § 16a):
Section 5a ..... 2, 4, 8, 21, 22, 24, 25

Sherman Act (26 Stat. 209; 69 Stat. 282; 15 U.S.C.A. § 2):
Section 2 ..... 2, 3, 4, 5, 25, 26, 27, 28, 30

IN THE

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OCTOBER TERM, 1967

No. 335

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THE HANOVER SHOE, INC.,

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UNITED SHOE MACHINERY CORPORATION,

*Respondent.*

---

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS
FOR THE THIRD CIRCUIT

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## BRIEF FOR PETITIONER THE HANOVER SHOE, INC.

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### Opinions Below

The Findings of Fact, Conclusions of Law and Opinion of the District Court for the Middle District of Pennsylvania are printed (A 27) and reported 245 F. Supp. 258-99. The Supplemental and Amended Findings of Fact, Conclusions of Law and Opinion as Amended are printed (A 162) and reported 245 F. Supp. 299-308. The opinion of the Court of Appeals is printed (A 185) and reported 377 F.2d 776. The supplemental opinion following denial of rehearing is printed (A 217) and the Court of Appeals' per curiam decision denying rehearing is printed (A 227) and reported 377 F.2d 793.

## Jurisdiction

The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1), 62 Stat. 928.

The Judgment and Order of the Court of Appeals was entered on April 11, 1967. An Order Amending Judgment and the Amended Judgment of the Court of Appeals was entered on June 7, 1967 and is printed (A 223). The order of the Court of Appeals denying rehearing was entered May 18, 1967 and is printed (A 227). The petition for a writ of certiorari was filed July 7, 1967 and was granted October 9, 1967 (A 229).

## Statutes Involved

The statutes involved are as follows:

15 U.S.C.A. § 2. Monopolizing trade a misdemeanor; penalty

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court. July 2, 1890, c. 647, § 2, 26 Stat. 209; July 7, 1955, c. 281, 69 Stat. 282.

15 U.S.C.A. § 16. Judgment in favor of Government as evidence; suspension of limitations

(a) A final judgment or decree heretofore or hereafter rendered in any civil or criminal proceeding brought by or on behalf of the United States under the antitrust laws to the effect that a defendant has vio-

lated said laws shall be prima facie evidence against such defendant in any action or proceeding brought by any other party against such defendant under said laws or by the United States under section 15a of this title, as to all matters respecting which said judgment or decree would be an estoppel as between the parties thereto; *Provided,* That this section shall not apply to consent judgments or decrees entered before any testimony has been taken or to judgments or decrees entered in actions under section 15a of this title. Oct. 15, 1914, c. 323, § 5, 38 Stat. 731; July 7, 1955, c. 283, § 2, 69 Stat. 283.

15 U.S.C.A. § 15. Suits by persons injured; amount of recovery

Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee. Oct. 15, 1914, c. 323, § 4, 38 Stat. 731.

## Questions Presented

The questions presented arise in an action for treble damages for violation of the antitrust laws in which plaintiff below, The Hanover Shoe, Inc. (hereinafter Hanover) brought an action against defendant, United Shoe Machinery Corporation (hereinafter United) to recover damages for injuries from monopolization by United of trade in shoe machinery in violation of Section 2 of the Sherman Act.

The questions presented are:

1. whether the party damaged is required to reduce its damage calculations, during the period of the statute of

limitations, by whatever income tax reduction it may have derived during the damage period as a result of leasing shoe machinery as compared with the tax reduction it might have derived on the assumption—contrary to fact—that it had it been able to buy shoe machinery when its claim of monopolization and violation of Section 2 of the Sherman Act is that, among other matters, United made its principal shoe machinery available to Hanover only on lease so that Hanover was unable to buy from United, and when, under the decision of this Court in *Commissioner of Internal Revenue* v. *Glenshaw Glass Co.*, 348 U.S. 426 (1955), Hanover will be subject to tax on the full trebled amount of its recovery;

2. whether on the record in this case United monopolized the shoe machinery trade in violation of Section 2 of the Sherman Act during the full period of the applicable statute of limitations, i.e., from July 1, 1939 through June 1, 1955, or whether the decision of this Court in *American Tobacco Co.* v. *United States*, 328 U.S. 781, on June 10, 1946 requires that the conduct of United be held to have been lawful prior to that date and unlawful after that date so that Hanover may not, as a matter of law, recover damages for conduct of United prior to that date, although it may for the same conduct thereafter, the reason being that the decision of this Court in *American Tobacco* may be given only prospective and not retrospective application in so far as it may be applicable to the conduct of United.

## Statement of the Case

This is an action by petitioner, Hanover, against United to recover treble damages for violation of Section 2 of the Sherman Act through alleged monopolization of the shoe machinery industry and alleged monopolistic practices with respect to substantially all shoe machinery re-

quired and used by Hanover, a manufacturer of men's welt shoes.

After trial before the District Court without a jury the Court concluded that United had violated Section 2 of the Sherman Act. It found that, among other matters, United's market share ranged from 89% to 100% of the 20 major machine types, the rentals and royalties of which accounted for more than 80% of the charges paid by Hanover to United.* It further found that United made its principal shoe machinery, including the 58 machine types leased by Hanover, available to shoe manufacturer cus-

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* The finding of the District Court on evidence as of May, 1947 is that:

"Of the 20 major machine types included in the 56, the rentals and royalties of which accounted for more than 80 percent of the charges Hanover paid United, United's market share was:

| | | |
|---|---|---|
| 100% | ..... | 4 types |
| 99% | ..... | 6 types |
| 98% | ..... | 4 types |
| 97% | ..... | 3 types |
| 89—93% | ..... | 3 types |
| | | 20 |

There is no evidence that United suffered any appreciable limitation in its share of the market with respect to these machine types prior to the filing of the complaint."

(A 34-35) (245 F.Supp. 265-266)

"As of about May, 1947, United's share of the market of 56 of the 58 lease-only machine types leased by Hanover—there being no data in evidence as to the remaining two—was as follows:

| | | |
|---|---|---|
| 100% | ..... | 10 types |
| 99% | ..... | 14 types |
| 98% | ..... | 7 types |
| 97% | ..... | 4 types |
| 96% | ..... | 5 types |
| 90—95% | ..... | 9 types |
| 85—89% | ..... | 1 type |
| 80—84% | ..... | 3 types |
| 55—69% | ..... | 3 types |
| | | 56" |

(A 34) (245 F.Supp. 265)

tomers only on lease and that as a result of the unlawful monopolization Hanover was required to pay more for leasing the shoe machinery it needed and used than it would have been required to pay had it been able to buy machinery in a free and competitive market and that Hanover was injured and sustained damage thereby (A 106-107) 245 F. Supp. 298.

The District Court fixed the period of time for which Hanover might recover damages as July 1, 1939 through September 21, 1955 (A 107) 245 F. Supp. 298-299. There is no dispute as to this (A 97, fn. 15; A 210-211) 245 F. Supp. 294 fn. 15; 377 F. 2d 790-791.* The District Court fixed the amount of Hanover's damage during this period of some 16 years as $1,413,203 (A 166) 245 F. Supp. 302 and entered judgment for $4,239,609 after trebling (A 180).

On appeal by United, the Court of Appeals vacated the judgment of the District Court as to damages and awarded a new trial limited to damages in accordance with the opinion of the Court (A 217-218, A 223-226) 377 F.2d 793.

The Court of Appeals held that the District Court had committed error:

A. In failing to reduce the amount of the damages by the amount of the reduction in taxes that accrued to Hanover during the damage period by reason of leasing its shoe machinery from United rather than owning it, assuming it had a choice (A 213-215) 377 F.2d 792-793; and

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* The Court of Appeals held that the damage period ended not on September 21, 1955 but on June 1, 1955, the date on which "the unlawful lease-only policy had ended," 377 F.2d 776, 791. This was the effective date of the final decree in the Government case. Hanover makes no issue on this point.

B. In awarding damages to Hanover for the period July 1, 1939, the commencement of the applicable statute of limitations, through June 10, 1946, the date of the decision of this Court in *American Tobacco Co.* v. *United States*, 328 U.S. 781 (A 203-209) 377 F.2d 787-790.

We submit that the Court of Appeals erred on both points.

## SUMMARY OF ARGUMENT

I. Hanover urges error in that the Court of Appeals, although it agreed with the holding of the District Court that Hanover was required to pay more on the leases for the use of its shoe machinery than it would have been required to pay if the machinery had been available for sale in a free and competitive market, held that the amount of Hanover's damages should be reduced by the difference between the tax consequences of leasing machinery and the tax consequences of owning machinery, even though Hanover was deprived by the defendant monopolist of the opportunity to buy the machinery. It is Hanover's position that such a holding benefits the wrongdoer, United, and imposes a penalty on the victim, Hanover, in that Hanover is twice subjected to taxation; first, by having its recovery reduced and second, by having to pay taxes on such reduced recovery, *Commissioner of Internal Revenue*, v. *Glenshaw Glass Co.*, 348 U.S. 426 (1955).

Hanover urges error in that the Court of Appeals (a) failed to follow the general rule applicable in tort and breach of contract cases to the effect that in determining damages tax consequences are not to be considered and (b) failed to follow the principle adopted by itself when it affirmed the District Court in *Hanover Shoe, Inc.* v. *United Shoe Machinery Corporation*, 185 F. Supp. 826 (M.D. Pa.

1960), *aff'd*, 281 F.2d 481 (3d Cir. 1960), *cert. den.* 364 U.S. 901 (1960).

Hanover urges error in that the Court of Appeals failed to follow the practice of other district and circuit courts which have uniformly awarded to successful treble damage plaintiffs the full damages sustained by them and disregarded tax consequences in doing so.

Hanover urges error in that the decision of the Court of Appeals is contrary to the Congressional policy enunciated in the Clayton Act, 15 U.S.C. Sections 15 and 16, that treble damage actions constitute one of the sanctions imposed for violation of the antitrust laws and that treble damage plantiffs be entitled to recover threefold the damages sustained by them.

II. Hanover urges error in the decision of the Court of Appeals that Hanover could not recover for damages inflicted prior to June 10, 1946, the date of the decision of this Court in *American Tobacco Co.* v. *United States*, 328 U.S. 781. The Court of Appeals reasoned that the decision in *American Tobacco* adopted a "new rule of law" that "for the first time" made United's conduct unlawful, that this decision might not be given retroactive effect and that, therefore, United had not violated the Sherman Act prior to that date. The period of the applicable statute of limitations was from July 1, 1939 through June 1, 1955. The result of the decision was to deprive Hanover of damages for almost seven years of the statutory period.

Hanover urges error in that United's overwhelming share of the shoe machinery market, ranging from 89% to 100% of the 20 major machine types, condemns it under the language of the statute and under decisions that long antedate the decision in *American Tobacco* in 1946.

Hanover also urges error in that the opinion in *American Tobacco* shows that this Court did not then announce a new rule of law; that in quoting and endorsing parts of the opinion of Judge Hand in *United States* v. *Aluminum Co. of America*, 148 F. 2d 416 (2d Cir. 1945) this Court was endorsing statements of law by Judge Hand expressly based upon earlier decisions of this Court, all of which long antedate the commencement of the period of limitations in the present case; that United stands condemned not only under the statute itself but under the interpretation of the statute stated in 1932 in *United States* v. *Swift & Co.*, 286 U.S. 106, 116, as a monopoly that abused its power through its long standing exclusionary lease-only policy and practices.

The Court of Appeals also erred in holding that the decision in *American Tobacco* in 1946 might be given only prospective application. Hanover submits that there is nothing in the opinion in that case to suggest that it be given anything but the full application given other decisions. The view taken by the Court of Appeals would nullify the statutory remedy provided by Congress to an injured person. There is no injustice, as the Court of Appeals stated, in the "retroactive imposition of the penalty of treble damages" (A 207) 377 F.2d 789. Hanover's right to recover damages for the injury done to it by the monopolist is provided by statute. It is entitled to recover.

The Court of Appeals was also in error in declaring that United's leasing policy met with "the approval" of this Court in "three successive decisions" and that it was, therefore, unjust to impose "the penalty of treble damages" upon United until June 10, 1946 when the decision in *American Tobacco* "for the first time made its conduct unlawful" (A 206-207) 377 F.2d 788-789. United's lease-only policy was not in issue in any of the three decisions. United's leases were not in issue in the 1913 decision in

*United States* v. *Winslow*, 227 U.S. 202. Its leases, though attacked in the 1918 case, *United States* v. *United Shoe Machinery Corporation*, 247 U.S. 32, were sustained as a proper exercise of United's patent rights, rights which have since expired. Its leases were attacked again in proceedings instituted promptly after enactment of the Clayton Act in 1914. Section 3 of that Act was applicable whether the machinery was patented or unpatented and United's leases were an explicit part of the legislative purpose of this Act. United was found to have violated the Act in the 1922 decision of this Court, *United Shoe Machinery Corp.* v. *United States*, 258 U.S. 451.

A substantial body of precedent gave United ample notice long before 1946 that any company that enjoyed from 89% to 100% of a market and that had throughout its history engaged in exclusionary conduct such as its lease-only policy and that had been publicly stated to be "a monopoly" in 1914 in the course of the legislative history of the Clayton Act and against which one of the provisions of the Clayton Act was directed,* was surely likely to be vulnerable under the antitrust laws.

The Court of Appeals erred in stating that United pursued its affairs "in the shelter of Supreme Court approval" (A 206) 377 F.2d 788. On the contrary, Hanover submits that United conformed its conduct to the law only as court orders required it to do so and only to the extent required.

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* See H.R. Rep. No. 627, 63d Cong., 2d Sess., p. 13 (quoted *infra* in footnote to page 35) on the legislative history of § 3 of the Clayton Act, 15 U.S.C. § 14.

## ARGUMENT

### I.

**The Court of Appeals erred in requiring the District Court to reduce its damage calculations by whatever income tax reduction Hanover may have derived during the damage period as a result of leasing shoe machinery, as compared with the tax reduction it might have derived on the assumption—contrary to fact—that it had been able to buy shoe machinery, with the results that (a) the wrongdoer United is benefited at the expense of Hanover by the reduction of the damages payable by United and Hanover is twice subjected to taxes: (1) in the calculation of its damages and (2) when it again pays taxes on the recovery from which taxes have already been deducted in the damage calculations, and (b) contrary to Congressional policy Hanover is denied the damages it has sustained.**

1. The decision of the Court of Appeals on this point.

Hanover's theory of damages, accepted by the District Court and the Court of Appeals, was that United's monopolization of the shoe machinery industry, effectuated by its unlawful policy of offering only on lease the principal machinery required by Hanover, injured Hanover in that "Hanover was required to pay more on the leases for the use of its shoe machinery than it would have been required to pay if the machinery had been available for sale in a free and competitive market" (A 211) 377 F.2d 791.

The decision of the Court of Appeals did not give full effect to this theory of damages. While it agreed with the District Court that damages should be measured by the excess of cost of leasing over cost of ownership in a free

market, it insisted that tax costs under both systems should be included in the calculation. For this purpose, the judgment of the District Court was vacated and a new trial ordered to permit "United to show the favorable tax consequences which Hanover obtained from leasing and the unfavorable consequences which would have flowed from ownership of the machinery" (A 215) 377 F.2d 792-793.

The reasoning of the Court of Appeals was that the damage calculation must be adjusted to take account of "the tax elements which would bear on Hanover's choice of purchasing rather than leasing the machinery it required" (A 214) 377 F.2d 792. This assumes, contrary to fact, that Hanover had a choice between leasing and purchasing. It had no such choice. The Court added that "the award of damages should not exceed the difference between the two alternatives as Hanover itself would have computed it" (*ibid.*)—after tax. The reference to the computations Hanover would have made is based on the assumption that Hanover, in choosing between leasing and owning, would have been guided solely by tax considerations; that Hanover would not have chosen to purchase its machinery, regardless of what other considerations might impel it to do so, if the after-tax savings appeared to be less than the savings computed before taxes. There is no support in the record for any such assumption.*

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* The record contradicts the assumption of the Court of Appeals as to how Hanover would have computed the differences between buying and leasing. On one occasion Hanover did indeed calculate the difference in costs between leasing and purchasing. That was when it decided in 1955 to purchase defendant's machines then in its factory which until then had been available only on lease and which United was then required to offer for sale. The record contains the calculations made by Hanover's treasurer, Paul Spears, as to the differences between the costs of leasing and purchasing (Defendant's Exhibit 33; R. 548), as well as the testimony of Paul Spears with respect to such calculation (R. 517-551) and the minutes of the meeting of the

2. The Court of Appeals erred in holding that in calculating "damages by him sustained" 15 U.S.C. § 15 the impact of taxes must be computed.

In an action for damages for violation of the antitrust laws the plaintiffs is entitled to recover threefold the full amount of damages it sustains. Plaintiff is then required to pay income tax on both the one-third compensatory damage component, § 61 Int. Rev. Code, and the two-thirds punitive damage component of its recovery, *Commissioner of Internal Revenue* v. *Glenshaw Glass Co.*, 348 U.S. 426 (1955). Under the correct and heretofore universal practice, plaintiff obtains judgment for the full amount of damages inflicted during the years of injury, without considering what the tax situation of plaintiff would have been if he had not been injured. He is thus made whole and pays his tax on the amount of damages to which he has been found entitled under the law in the year of recovery. In fact, Hanover paid no tax on this amount during the damage period because, due to United's violation of the Sherman Act, Hanover's receipt of the amount is postponed until the year of recovery.

The result of the decision of the Court of Appeals is that Hanover is required to give effect to tax consequences twice. First, its damages are reduced by the imposition of taxes on what would have been additional income in the years of damage and, second, they are further reduced by the imposition of taxes under Section 61 and the *Glenshaw*

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Board of Directors of Hanover at which the purchase was decided upon (Defendant's Exhibit 31; R. 274). Nothing in these exhibits nor in the testimony indicates that in choosing to purchase at that time, Hanover gave any consideration to the possible "tax consequences." Rather they demonstrate in making its decision Hanover considered only gross payments before taxes. (References in this footnote are to the transcript and to exhibits in the District Court, not printed in the Appendix.)

*Glass* decision on the remaining reduced recovery. As a consequence the wrongdoer United is benefited at the expense of Hanover in that the amount of damage it must pay is reduced by the "tax consequences" of the wrong to Hanover; conversely, the victim Hanover is not fully recompensed in that its damages are reduced by the amount of tax it is assumed it would have paid in the years of injury if the injury had not been inflicted and it must still pay taxes on the reduced sum in the year of recovery.

A simple illustration, taking no account of trebling, demonstrates the inequity which would result from the application of the rule enunciated by the Court of Appeals. For the purpose of this illustration, we have avoided the complexities mentioned, *infra* (see footnote, page 22), that might be brought into play in determining what taxes had to be considered, and have used a simple 50% tax rate applicable in all years. We have further rounded off to $1,400,000 Hanover's before-tax damages due to excessive rental costs. (These were set by the District Court at $1,413,203 (A 166) 245 F. Supp. 302.) With these assumptions the damages to be awarded pursuant to the Court of Appeals' interpretation of Section 4 of the Clayton Act 15 U.S.C. § 15, would be $700,000, and the financial effect on Hanover, the victim, after recovery and payment of taxes thereon would be:

| | |
|---|---|
| Excess Rental Charges* paid to United, 1939-1955 | $1,400,000 |
| Less reduction in taxes due to deduction of Excess Rental Charges from income (50% rate) | 700,000 |

* *I.e.*, excess of rental cost over free market ownership cost before tax.

| | | |
|---|---|---|
| Net out of pocket after taxes | | $ 700,000 |
| Recovery, if prior tax "saving" is deducted from Excess Rental Charges | $700,000 | |
| Less tax on recovery (50% rate) | 350,000 | |
| Net recovery | | 350,000 |
| Hanover out of pocket after recovery | | ($ 350,000) |

With the same assumptions, the effect on United, the wrongdoer, would be:

| | | |
|---|---|---|
| Excess Rental Charges received from Hanover | | $1,400,000 |
| Less tax paid thereon (50% rate) | | 700,000 |
| Net in pocket after taxes | | $ 700,000 |
| Recovery paid to Hanover | $700,000 | |
| Less reduction in taxes due to deduction of such payment from income (50% rate) | 350,000 | |
| Net amount paid out | | 350,000 |
| United in pocket after paying recovery | | $ 350,000 |

A rule by which the wrongdoer ends up with a $350,000 profit and the victim ends up $350,000 out of pocket is obviously unjust and patently absurd.

3. The District Court correctly disregarded tax considerations.

The correct rule applied by the District Court (A 92-93) 245 F. Supp. 292 is, we submit, that tax consequences

are not a part of the damage calculation.* This is the rule applicable in tort and breach of contract cases.* It is the rule applied by the late Judge Goodrich on the separate trial of the defense of United that Hanover had not been damaged because Hanover had passed on its loss to its customers in the sale of shoes. The District Court rejected this defense, *Hanover Shoe, Inc.*, v. *United Shoe Machinery Corporation,* 185 F. Supp. 826 (M.D. Pa. 1960), *aff'd,* 281 F.2d 481 (3d Cir. 1960), *cert. den.,* 364 U.S. 901 (1960), holding: "The plaintiff's injury occurred when it was charged too much for the machinery," and adding:

> "If it had not thus been illegally charged for machinery it would have had more money to pay out in dividends, or to engage in a further development campaign to sell its shoes, or to raise the wages of its employees, or to enlarge its bank account as protection against a rainy day, or for all of these things. The plaintiff against whom a tort is committed has his cause of action at the moment that the tort occurs. Of course, he is subject to the rule of avoidable consequences and cannot sit still and let damages pile up when reasonable steps would have prevented further consequential damages. But that is the extent of his obligation." 185 F. Supp. 829.

Judge Goodrich's decision supports the correct rule that tax consequences have no part in the damage calculation. It was error of the Court of Appeals to require that they be considered.

The Court of Appeals was less than accurate when it said that the District Court, in holding that tax conse-

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* This proposition was accepted by the District Court (A 92-93) 245 F. Supp. at 292, where it cited the cases collected in 63 A.L.R. 2d 1393 and 1433. See, *e.g., Stokes* v. *United States,* 144 F. 2d 82, 87 (2d Cir. 1944) (Frank, J.: amount of income taxes is "too conjectural.")

quences do not inure to the benefit of the defendants, relied upon Judge Goodrich's statement. It did so rely. But it also relied clearly and explicitly and, we submit, correctly on *Cereal Byproducts Co.* v. *Hall,* 16 Ill. App. 2d 79, 147 N.E. 2d 383 (1958). That was an action to recover damages resulting from the failure of defendant-auditors to discover embezzlements by one of the plaintiff's employees. As a result of the embezzlements, the plaintiff received a tax refund in the amount of $26,653.12, which the lower court offset against the recovery due from the defendants. The court said:

> "Plaintiff asserts that the income tax refund of $26,653.12 cannot be considered in mitigation of damages. The defendants answer that the trial court correctly held that the fixed and ascertainable tax benefit received by plaintiff as the result of its employee's embezzlement should be deducted from plaintiff's claim. Whether the plaintiff has received a tax refund on account of its loss is a matter that concerns only the plaintiff and the government. [Cases cited] The defendants did not cause nor did they provide the funds for the tax refund. On defendants' theory every suit for damages would necessitate consideration of the income taxes saved by the plaintiff on account of the loss and the taxes payable on account of the recovery. The same principle applies as would apply in the event plaintiff had carried insurance against these embezzlements. Neither payments by the insurance carrier nor tax refunds can mitigate defendants' liability. The insurance carrier would have an interest in the recovery from the defendants just as the federal government has a tax interest in the recovery by plaintiff. We think that the court erred in giving defendants credit for the income tax refund." (147 N.E. 2d at 384)

We have found no decision in any other circuit in an antitrust case, either before or after the *Glenshaw Glass* decision, that has considered tax consequences in calculating damages. On the contrary, the only antitrust case we have been able to find which even discussed the subject of taxes is *Twentieth Century-Fox Film Corp.* v. *Brookside Theatre Corp.*, where the plaintiff recovered. The case was tried in 1951 in the Western District of Missouri, and affirmed, 194 F.2d 846 (8th Cir. 1952), *cert. den.*, 343 U.S. 942 (1952). The charge to the jury in that case is set forth in CHARGES TO JURIES by Caskey & Scott, Vol. II, pages 760-761. The District Court's charge explicitly covered the very subject with which we are concerned here, to wit, the effect of income taxes on a plaintiff's recovery and said:

> "Your verdict should be in such sum as you find and believe from the evidence will reasonably compensate the plaintiff for the damages to its business or property, and I charge you that in considering such amounts, you should not take into consideration any question with respect to income taxes, state or federal, which have been paid or may hereafter be required to be paid.
>
> "If plaintiff is permitted to recover, it will be required to pay an income tax upon the amount of the verdict, and the amount of the tax which has already been paid by the defendants on their earnings and profits and which may be required to be paid by the plaintiff are matters for adjustment between the respective parties and the United States."

In every other case the courts have simply paid no attention to possible tax consequences. There is no clearer statement of the law as it existed until the decision by the 3rd Circuit below than in *Straus* v. *Victor Talking Machine Co.*, 297 Fed. 791 (1924) in the Second Circuit. The

court held that plaintiff's damages were the difference between what the Macy partners paid for defendant's merchandise and the price they would have paid in a free and open market.

The court, after citing the classic statement of Justice Holmes in *Southern Pacific Co.* v. *Darnell-Taenzer Lumber Co.*, 245 U.S. 531, 533 (1918), that

> "The general tendency of the law, in regard to damages at least, is not to go beyond the first step,"

went on to say:

> "Here the defendants themselves adduced testimony that the price charged by distributors to dealers under the price schedule of Victor Company was reasonable. The jury must have so found. Plaintiffs were compelled to pay more than this reasonable price. Why? Manifestly because the illegal combination forced them so to do in order to carry on the requirements of their business. Whether, then, plaintiffs sold to their customers at a profit or loss becomes immaterial in this case. They were entitled to goods at the reasonable price thereof. Through no legal faults of theirs, but because of defendants' wrong, they were deprived of their right, and the jury could find that such deprivation defined in money was the difference between the established reasonable price and the amounts plaintiffs were compelled to pay, provided as the trial judge charged, 'they acted reasonably in making these payments.' [Citing cases] It is thus unnecessary to 'go beyond' this 'first step.'" (297 Fed. at 803.)

Cases in other circuits are to the same effect.*

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* 5th Circuit. *North Texas Producers Assn.* v. *Metzger Dairies*, 348 F.2d 189 (5th Cir. 1965), *cert. den.*, 382 U.S. 977 (1966). Action under Section 2 of the Sherman Act. Approximately 60% of the total damages of $606,000 was assessed as the increased cost of obtaining monopolized product.

There is no difference cognizable in law between, on the one hand, damages caused by the exaction of higher prices, as in the *Straus* and *North Texas* cases, or by being deprived of additional income, as in the *Rubenstein* case, and, on the other hand, damages caused by imposition of higher charges for the use of machinery. In each instance, absent the restraint or monopoly, the victim would have enjoyed additional income. We believe it to be of more than passing significance that never before has any decision directed that there should be deducted from the damages designed to make the victim whole the difference between the tax payments he made and those he would have made if he had not been victimized. This is what the Court of Appeals has directed. Its decision stands alone.

4. The decision of the Court of Appeals is contrary to the Congressional policy evidenced by the Antitrust Laws.

The policy of Congress with respect to violations of the antitrust laws has long been crystal clear. The Sherman

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8th Circuit. *Charles Rubenstein, Inc.* v. *Columbia Pictures Corp.*, 176 F. Supp. 527 (D. Minn. 1959), *aff'd*, 289 F.2d 418 (8th Cir. 1961). Action under Sections 1 and 2 of the Sherman Act; damages computed on the basis of gross receipts minus a percentage of film rentals and plaintiff was awarded the difference in the net gross box office return which would have been achieved as compared with actual net gross box office return.

9th Circuit. *Sterling Nelson & Sons, Inc.* v. *Rangen, Inc.*, 235 F. Supp. 393 (D. Idaho 1964), *aff'd*, 351 F.2d 851 (9th Cir. 1965), *cert. den.*, 383 U.S. 936 (1966). Action under Section 3c of the Clayton Act relating to commercial bribery and rebates. Damages found to be an estimated profit of 15% on anticipated sales.

See also *A. C. Becken Co.* v. *Gemex Corp.* in the 7th Circuit, 1961 Trade Cases ¶70,118 (N.D. Ill. 1961), *aff'd* 314 F.2d 839 (7th Cir.), *cert. den.*, 375 U.S. 816 (1963) and *Union Carbide and Carbon Corp.* v. *Nisley* in the 10th Circuit, 300 F.2d 561 (1961), *appeal dismissed*, 371 U.S. 801 (1962).

Act carries with it both criminal and civil sanctions. On the criminal side the sanctions are a fine not exceeding $50,000 and imprisonment not exceeding one year. It is well known that the imprisonment sanction has been imposed only on rare occasions, and the possible fines are small in amount. On the civil side the Government can obtain an injunction which does no more than establish the illegality of a defendant's past practices and enjoin their continuance. Over and above these sanctions, which can be applied in Government actions, Congress has created perhaps the most potent of all the sanctions provided by the Act by according the remedy of the treble damage action to victims of antitrust law violations. To assist those victims in the proof of their claims Congress adopted Section 5 of the Clayton Act, 15 U.S.C. § 16, by the terms of which a judgment or decree in a provious Government action becomes prima facie evidence against the wrongdoer.

The Congressional policy underlying the role of the treble damage provisions in the enforcement of the antitrust laws has been emphasized in numerous decisions of this Court.* As this Court said in *Radovich* v. *National Football League,* 352 U. S. 445 (1957):

> "• • • Congress has, by legislative fiat, determined that such prohibited activities are injurious to the public and has provided sanctions allowing private enforcement of the antitrust laws by an aggrieved party. These laws protect the victims of the forbidden practices as well as the public. *Mandeville Island Farms, Inc.* v. *American Crystal Sugar Co.*; 334 U.S. 219, 236 (1948). Furthermore,

* *City of Atlanta* v. *Chattanooga Foundry and Pipeworks,* 127 Fed. 23 (6th Cir. 1903); *Lawlor* v. *National Screen Service Corp.,* 349 U.S. 322, 329 (1955); *Flintkote Co.* v. *Lysfjord,* 246 F.2d 368 (9th Cir. 1957); *Radovich* v. *National Football League,* 352 U.S. 445 (1957).

> Congress itself has placed the private antitrust litigant in a most favorable position through the enactment of § 5 of the Clayton Act. *Emich Motors Corp.* v. *General Motors Corp.*, 340 U.S. 558 (1951). In the face of such a policy this Court should not add requirements to burden the private litigant beyond what is specifically set forth by Congress in those laws." (352 U.S. at 453-454).

Acceptance of the unique construction of the treble damage provision enunciated by the Court of Appeals would seriously erode this Congressional policy.

In effect the Court of Appeals disregards the plain language of the statute that a plaintiff shall recover "threefold the damages by him sustained," 15 U.S.C. § 15. Rather, if the Court of Appeals opinion is a correct reflection of the law, a duty will be imposed on courts and on juries not to award to a plaintiff the "damages by him sustained" but rather a lesser amount determined after a calculation designed to determine the tax effects on the victim in the years of injury.*

Further, the rule enunciated by the Court of Appeals would inevitably result in discrimination based not upon the merits of the causes advanced by plaintiffs but on their tax statuses. If Hanover, for example, instead of having been a profitable enterprise during the damage period, had received no net taxable income during that period, there would be no taxes to be deducted from its recovery and it

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* The determination of the impact of taxes on business decisions of whether to buy or lease machinery no longer involves, as it did many years ago, the simple tax effect of deducting rental payments versus deducting straight line depreciation and repair and maintenance expenses. Today, and for many years, the tax laws have become enormously complex. Under the rule of the Court of Appeals, juries and already overburdened trial judges in antitrust cases would be immersed in such baffling tax problems such as various methods of deducting depreciation, recapture of depreciation, investment credits, net operating loss carryovers, and consolidated return aspects.

would accordingly receive a larger judgment than if it had operated at a profit and had paid taxes during the years covered by the damage period. Similarly, a tax-exempt municipality would receive a fuller measure of damages than would be awarded the ordinary plaintiff. The result is that the same wrong perpetrated by the same wrongdoer will in one case result in a judgment representing the full amount of the excess costs which have been inflicted upon the plaintiff while in another case it will not. There is nothing in the statute which suggests that such discrimination should take place among victims of antitrust violations.

Still further, contrary to the suggestion implicit in the Court of Appeals' opinion (A 213-215) 377 F.2d 792-793, income taxes are not a cost of doing business. Taxes are not incurred for the purpose of earning income. Rather, they are imposed upon income which has been earned and are not paid until the income has been earned. The government's right is to receive a share of the net income of a business after all costs and expenses have been deducted, an interest not unlike that of a partner. We submit, though the analogy is not exact, that, for purposes of damage calculations, taxes are no more deductible than would be profits distributed to partners or dividends paid to stockholders.

A monopolist, or any other violator of the antitrust laws, who might well be deterred by a judgment which trebled the full amount of the damage sustained by a victim, might be willing to run the lesser risk of a treble damage action in which the damages it would have to pay would be reduced by subtraction of putative tax "savings." On the other hand, the injured victim, faced with a recovery to be diminished by the deduction of tax "savings" from its damages and again by the imposition of taxes when re-

ceived, might well hesitate to invest the time, money and effort necessary to obtain a recovery significantly less than injured parties have heretofore received under the statute.

Whether viewed in the light of the effects it would produce on the parties to this action or in the light of the longstanding practice of the courts in other treble damage cases or in the light of the Congressional policy set forth in Sections 4 and 5 of the Clayton Act, 15 U.S.C. §§ 15 and 16, there is no justification in principle or precedent for the action of the Court of Appeals and its error should be corrected.

## II.

**The Court of Appeals erred in holding that United had monopolized the shoe machinery industry only after June 10, 1946, the date of the decision of this Court in *American Tobacco Co.* v. *United States*, 328 U.S. 781 and that its conduct, though the same both before and after that date, had been lawful prior to that date with the result that Hanover might not recover damages through the full period of the applicable statute of limitations from July 1, 1939 through June 1, 1955 but that instead its damage claim must be cut off on June 10, 1946 because the decision in *American Tobacco* should not be given retroactive application in a later treble damage antitrust case.**

1. The decision of the Court of Appeals on these points.

An important item of proof in support of Hanover's claim of monopolization by United was the final decree in *United States* v. *United Shoe Machinery Corporation*, 110 F. Supp. 295 (D. Mass. 1953), *affirmed per curiam*, 347 U.S. 521 (1954), (hereinafter the Government case), in which the District Court adjudicated that United violated

Section 2 of the Sherman Act by monopolizing the shoe machinery trade and commerce among the several states. This Court, in affirming, *per curiam*, the judgment of the District Court, stated that it did so "being satisfied that the findings are justified by the evidence and support the decree," (347 U.S. at 521). This final decree was offered and received in evidence under Section 5a of the Clayton Act (15 U.S.C. § 16a) as prima facie evidence of the alleged violation.

The Court of Appeals found that the decision in the Government case "demonstrates that the lease-only system itself was adjudicated in the Government case to be a means of monopolization," (A 203) 377 F.2d 787 and that Hanover was entitled to the benefit of this determination in the present action. The Court of Appeals correctly rejected United's contention that the adjudication of monopolization in the Government case operated only prospectively from the date of the decree therein and had no retrospective effect (A 204) 377 F.2d 787 but it then proceeded to hold that retroactivity did not extend to the beginning of the statutory period of limitation on July 1, 1939 but must be cut off on June 10, 1946 (A 204-209) 377 F.2d 787-790. The result of this decision was to require a recomputation of damages limited to the period after this newly-fixed date. The judgment below was, therefore, vacated and a new trial ordered limited to the recomputation of damages in accordance with the opinion of the Court (A 217) 377 F.2d 793.

The reasoning of the Court of Appeals in fixing a cut off date on June 10, 1946 was that this was the date of the decision of this Court in *American Tobacco Co.* v. *United States, supra;* that prior to that date a necessary element in a violation of Section 2 of the Sherman Act was proof of predatory practices; that in the Government case the Dis-

trict Court had found an absence of predatory practices by United; that it followed that United had not violated Section 2 of the Sherman Act prior to June 10, 1946 and that it also followed that, absent a violation of law during the period prior to June 10, 1946, Hanover might not recover damages for acts of United prior to that date (A 204-209) 377 F.2d 788-796.

The Court of Appeals observed that the retroactive effect to be given to a decision of a court "should be determined from the circumstances of the particular case, having in mind the purpose which the new rule of law [that of the *American Tobacco* decision] seeks to accomplish and the practical weighing of the comparative benefits and evils of retroactivity" (A 207) 377 F.2d 789. It concluded that it was unjust to impose "the penalty of treble damages" retroactively (*ibid.*).

The Court of Appeals noted that United had been involved in antitrust litigation that reached this Court on three occasions prior to the loss of the Government case. These earlier decisions, it was stated, gave United's counsel grounds for belief that its exclusionary lease-only policy stood under "the shelter of Supreme Court approval" (A 206) 377 F.2d 788 until the change of law occurred on June 10, 1946. As a consequence, it was held that United might carry on its practices in reliance upon those earlier decisions until June 10, 1946 when the *American Tobacco* decision presumably provided fair warning that all might not be well for United on the antitrust front.

The point stated above was neither briefed nor argued before the District Court or the Court of Appeals. The District Court correctly concluded that the proof before it showed a violation of the antitrust law by United throughout the period of limitations.

2. The Court of Appeals erred in holding.

(a) that the decision of this Court in *American Tobacco Co.* v. *United States,* 328 U.S. 781, 811-15 in 1946 announced a "new rule of law" that "for the first time made its [United's] conduct unlawful." (A 207) 377 F.2d 789; and

(b) that the decision in *American Tobacco* might be given only prospective application (A 205, 207) 377 F.2d 788, 790; and

(c) that United's "leasing policy in various forms" was approved "by three successive decisions" of this Court. (A 206) 377 F.2d 788.

The combination of these points formed the ground for the decision of the Court of Appeals that "United's conduct cannot be held to have violated § 2 of the Sherman Act at any time prior to June 10, 1946" (A 209) 377 F.2d 790: the date of the decision of this Court in the *American Tobacco* case. The drastic result of this holding is that United's monopolistic and exclusionary acts, that were the same before and after June 10, 1946, are to be treated as lawful before and unlawful after that date with the further result that the injured victim, Hanover, whose injury was the same both before and after that date, is to be allowed damages only after that date.

We submit that the statutory allowance of treble damages provided by Congress to an injured party may not be cut off in this fashion. The *American Tobacco* decision does not announce a new rule of antitrust law or work such a change in the interpretation of § 2 of the Sherman Act that United's long standing lease-only policy challenged here and earlier in the Government case became unlawful for the first time on June 10, 1946.

The unchallenged facts are that United's market position throughout the period of the statute of limitations was found by the District Court to be "an overwhelming share of the shoe machinery market" (A 35) 245 F.Supp. 266, a share that ranged from 89% to 100% of the 20 major machine types, the rentals and royalties of which accounted for more than 80% of the charges Hanover paid to United.* These findings are not challenged.

A market position of this dimension is condemned under the language of the statute and the statute was so construed by this Court in decisions that long antedate the *American Tobacco* decision of 1946.

The language of Section 2 of the Sherman Act condemns "Every person who shall monopolize, or attempt to monopolize . . ." and, absent a showing that the monopoly was "thrust upon" United, we submit that a control, however maintained, of 89% to 100% is surely, as both courts below found, a violation. It is a violation, we submit, on the face of the language of the statute. Monopolization is the ultimate evil against which the statute is aimed.** Even an attempt to achieve it is prohibited under Section 2.

(a) the decision in *American Tobacco* does not announce a new rule of antitrust law.

In its opinion in *American Tobacco* this Court quoted and endorsed, 328 U.S. at 813-814, five statements from the

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* *Supra* p. 5 and footnote.

** The strength with which this view was held is shown in the following statement of Senator Sherman in the Congressional debates on the Act:

"If the concentered powers of this combination are intrusted to a single man, it is a kingly prerogative, inconsistent with our form of government, and should be subject to the strong resistance of the State and national authorities . . ." 21 Cong. Rec. 2457. See also 21 Cong. Rec. 2460, 2598.

opinion of Judge Hand in *United States* v. *Aluminum Co. of America*, 148 F.2d 416 (2d Cir. 1945). Judge Hand at no point suggested that he was announcing a new rule of antitrust law. On the contrary, he made the flat statement, quoted and endorsed in the *American Tobacco* opinion, that "In several decisions the Supreme Court has decreed the dissolution of such combinations, although they had engaged in no unlawful trade practices" *id.* at 429. In support Judge Hand cited four decisions of the Supreme Court in 1912, 1914, 1920 and 1922 that followed announcement of the rule of reason in 1911 in *Standard Oil Co.* v. *United States*, 221 U.S. 1:

> *United States* v. *Union Pacific R. Co.*, 226 U.S. 61, 88.
>
> *International Harvester Co.* v. *Missouri*, 234 U.S. 199, 209.
>
> *United States* v. *Reading Co.*, 253 U.S. 26, 57-59.
>
> *United States* v. *Southern Pacific Co.*, 259 U.S. 214, 230-231.

It was surely Judge Hand's view that no new rule of law was announced by him in Alcoa.

In addition, in its opinion in *American Tobacco Co.*, this Court quoted with evident approval the following language from *United States* v. *Patten*, 187 Fed. 664, a decision of a lower court in 1911:

> "It is undoubtedly true, under the law as it stands, that trade and commerce are 'monopolized' within the meaning of the federal statute, when, as a result of efforts to that end, such power is obtained that a few persons acting together can control the prices of a commodity moving in interstate commerce. It is not necessary that the power thus obtained should be exercised. Its existence is sufficient." *id.* at 672

United, with its overwhelming control of from 89% to 100%, was on notice from these and other early decisions that the words of Section 2 were to be read as they were written—monopolization was forbidden. Judge Hand in *Alcoa* relied heavily upon *United States* v. *Swift & Co.*, 286 U.S. 106 at 116. This Court in that 1932 case stated the rule to be:

> "Mere size, according to the holding of this court, is not an offense against the Sherman Act unless magnified to the point at which it amounts to a monopoly (*United States* v. *United States Steel Corp.*, 251 U.S. 417; *United States* v. *International Harvester Co.*, 274 U.S. 693, 708), but size carries with it an opportunity for abuse that is not to be ignored when the opportunity is proved to have been utilized in the past." 286 U.S. at 116

We submit that in the present case the record shows that United meets both points even though only one will suffice: (1) it is a monopoly with 89% to 100% of the trade and also (2) it has abused its power in its long standing exclusionary lease-only policy with the restrictive provisions of its leases.*

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* We have not deemed it necessary to review the law of Section 2 since the beginning of the period of the statute of limitations on July 1, 1939 in view of the issue now presented. However, the most recent statement of this Court in *United States* v. *Grinnell Corp.*, 384 U.S. 563 (1966) is, we submit, as applicable to United as the statement in the *Swift* case quoted above.

We refer to the following in the *Grinnell* opinion:

> "The offense of monopoly under § 2 of the Sherman Act has two elements: (1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident." *id.* at 570-71.

Surely United's share of 89% to 100% of the relevant market meets the first point and its maintenance of that power through its exclu-

We are confident that the Court of Appeals was in error in supposing that United and its counsel had to await the decision of this Court in *American Tobacco* on June 10, 1946 to be on notice that their position and practices might be violative of the antitrust laws.

(b) It was error for the Court of Appeals to hold that the decision in *American Tobacco* was to be given only prospective application.

The decision in the *American Tobacco* case is silent as to whether it is to be operative retroactively or only prospectively. We find nothing in the opinion to suggest that it is to be given anything but the full application given other decisions.

In *Simpson* v. *Union Oil Co.*, 377 U.S. 13 (1964) this Court considered the application of *U.S.* v. *General Electric Co.*, 272 U.S. 476. In *General Electric* the Court found unobjectionable the use of the consignment sale method by a patentee to control the prices at which its consignee sold the patented articles, but did not restrict its holding to patented articles, saying expressly that the use of the consignment device was available to the owners of articles either "patented or otherwise," 272 U.S. 476, 488. *Simpson*

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sionary lease-only policy over many years meets the second. Judge Wyzanski held in the Government case that:

> "Much of United's market power is traceable to the magnetic ties inherent in its system of leasing, and not selling, its more important machines." (110 F. Supp. 295, 344).

Further,

> "[United's leases] are contracts, arrangements, and policies which, instead of encouraging competition based on pure merit, further the dominance of a particular firm. In this sense, they are unnatural barriers; they unnecessarily exclude actual and potential competition; they restrict a free market." (*id.* at 344-345.)

declined to follow *General Electric* so far as unpatented articles are concerned. Likely out of concern for those, including Union Oil, who may have relied on the language of *General Electric*, the Court in ordering a remand, recognized and expressly reserved "the question whether, when all the facts are known, there may be any equities that would warrant only prospective application in damage suits of the rule governing price fixing by the 'consignment' device which we announce today," 377 U.S. at 24-25. There was in *Simpson* a clear change of a rule the Court had previously laid down. No such change can be found in *Aluminum* or *American Tobacco* or, as we shall see, in the *United Shoe* cases.

If the Court of Appeals is correct, it would mean that no private action for treble damages might be brought against the defendants in *American Tobacco* or in *United States* v. *Aluminum Co. of America*, 148 F.2d 416 (2d Cir. 1945), because the decisions in those cases, as the Court of Appeals reads them, would mean that there was no illegality until the day of decision. The result would be that the statutory remedy provided by Congress to an injured person would be nullified. A consequence so drastic warns against acceptance of the point made by the Court of Appeals.

We submit that the concern of the Court of Appeals for "the injustice of retroactive imposition of the penalty of treble damages" (A 297) 377 F.2d 789 is misplaced. Hanover's right to recover for injury done to it is granted by statute. Hanover established both violation and injury during the period of the applicable statute of limitations. It is entitled to recover.

(c) United's exclusionary lease-only policy was not in issue, much less approved, in earlier antitrust cases in which United was a defendant.

We turn next to the question as to whether, as the Court of Appeals declared, "the approval" of United's "leasing policy in various forms by three successive decisions" of this Court (A 206) 377 F.2d 788 made it unjust to impose "the penalty of treble damages" upon United until June 10, 1946 when the decision in *American Tobacco* "for the first time made its conduct unlawful" (A 207) 377 F.2d 789. The three decisions were in 1913, 1918 and 1922.

The first is *United States* v. *Winslow*, 227 U.S. 202 (1913). This was a criminal prosecution of the original combination of 1899 in which the District Court, on demurrer, construed the indictment as charging only a combination of non-competing companies. The Supreme Court regarded itself as bound by this construction and held that no offense was charged under the Sherman Act, 227 U.S. at 217. The leasing provisions and practices were not in issue, as this Court stated:

> "It is to be observed that the conditions now inserted in the leases are not alleged to have been contemporaneous with the combination, or to have been contemplated when it was made. The District Court construed the indictment as confined to the combination of February 7, [1899], that is, simply to the merger of the companies without regard to the leases subsequently made, 195 Fed. Rep. 592, 594; and we have no jurisdiction to review this interpretation of the indictment. *United States* v. *Patten*, 226 U.S. 525. Hence the only question before us is whether that combination taken by itself was within the penalties of the Sherman Act. The validity of the leases or of a combination contemplating them cannot be passed upon in this case. (227 U.S. at 216-217).

Hanover's complaint does not challenge the original combination of 1899.

The second is *United States* v. *United Shoe Machinery Corporation*, 247 U.S. 32 (1918). This was a civil proceeding to dissolve United that was brought contemporaneously with the criminal indictment. It, too, failed. The decision of the District Court dismissing the complaint was affirmed. This Court was divided 4 to 3. As to the original combination in 1899, this Court inquired as to whether the companies that were brought together were in competition, 247 U.S. at 40, stressed that the plants and patents of the companies were supplementary and non-competitive, *id.* at 40-56, and concluded:

> "The company, indeed, has magnitude, but it is at once the result and cause of efficiency, and the charge that it has been oppressively used is not sustained. Patrons are given the benefits of the improvements made by the company and new machines are substituted for the old ones without disproportionate charge. There has been saving as well in the cost of manufacture of shoes. These are some of the results of the organization of the United Company." *Id.* at 56.

We need not dwell on this aspect of the case because Hanover's complaint does not attack the original constitution of United in 1899.

The complaint also attacked the prohibitory clauses of United's leases of its shoe machinery. This Court, after reviewing eight specific clauses, accepted United's contention that the clauses were no more than exercises of United's right as holder of patents covering shoe machinery (*id.* 56-65). In the 1922 decision in *United Shoe Machinery Corp.* v. *United States*, 258 U.S. 451, this Court described the 1918 decision as one in which the leases "were sustained as valid and binding agreements within the rights of holders of patents." 258 U.S. at 460.

The second decision of 1918 could scarcely be of comfort to United because the law was changed by passage of the Clayton Act in 1914, even before the decision was reached. As this Court stated in the third decision in 1922, Section 3 of the Clayton Act "specifically applies to goods, wares, machinery, etc., whether *'patented or unpatented.'* This provision was inserted in the Clayton Act with the express purpose of preventing rights granted by letters patent from securing immunity from the inhibitions of the act." 258 U.S. at 460. Indeed, it was inserted, as the legislative history of Section 3 of the Clayton Act makes explicit, to deal with United's exclusive or tying provisions by which "the Shoe Machinery Co. has built up a monopoly."*

We submit that neither of these first two decisions furnishes any basis for the conclusion of the Court of Appeals that United was engaging in conduct "manifestly pursued

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* H.R. Rep. No. 627, 63d Cong., 2d Sess., p. 13 (1914). The report will also be found incorporated in S. Rep. No 698, 63d Cong., 2d Sess. (1914). The report singled out United as "a monopoly that owns and controls the entire machinery now being used by all great manufacturing houses of the United States," H.R. Rep. No. 627, 63d Cong., 2d Sess., p. 13. The pertinent part states:

> "Where the concern making these contracts is already great and powerful, such as the United Shoe Machinery Co., the American Tobacco Co., and the General Film Co., the exclusive or 'tying' contract made with local dealers becomes one of the greatest agencies and instrumentalities of monopoly ever devised by the brain of man. . . . By this method and practice the Shoe Machinery Co. has built up a monopoly that owns and controls the entire machinery now being used by all great shoe-manufacturing houses of the United States. No independent manufacturer of shoe machines has the slightest opportunity to build up any considerable trade in this country while this condition obtains. If a manufacturer who is using machines of the Shoe Machinery Co. were to purchase and place a machine manufactured by any independent company in his establishment, the Shoe Machinery Co. could under its contracts withdraw all their machinery from the establishment of the shoe manufacturer and thereby wreck the business of the manufacturer." *Ibid.*

in the shelter of Supreme Court approval" (A 206) 377 F.2d 788. On the contrary, we submit that United persisted in its restrictive lease provisions despite passage of the Clayton Act in 1914 and this brings us to the third decision in 1922, *United Shoe Machinery Corp.* v. *United States,* 258 U.S. 451, which held that a number of United's lease provisions were restrictive and ordered their discontinuance.

This Court put aside the protection of the 1918 decision that United claimed by stating that:

> "The issue whether the restrictive clauses were valid in view of the provision of the Clayton Act concerning machinery patented or unpatented was not and could not have been involved or decided in the former suit." 258 U.S. at 462.

This action under Section 3 of the Clayton Act did not attack United's lease-only policy but only certain restrictive provisions under Section 3.

We submit that there was nothing in any of the three earlier Government actions and in the decisions of this Court in those cases to "provide shelter of Supreme Court approval" (A 206) 377 F.2d 788 to United's long standing exclusionary lease-only policy and practice. This was not in issue in any of the cases until the United States filed its complaint in the Government case in 1947.

The first case, the 1913 *Winslow* case, was concerned only with the integration of non-competing entities. The second case, the 1918 *United* case, never reached a consideration of the effect of the lease restrictions. Rather, it looked upon those restrictions as a proper exercise of its patent rights by United. The third *United* case was not decided by this Court until 1922, although it was instituted by the Government promptly after the adoption of the

Clayton Act. The decisions of the District Court in that case are reported in 227 Fed. 507 (E. D. Mo. 1915), 234 Fed. 127 (1916) and 264 Fed. 138 (1920). There certain specific provisions of United's leases were held violative of Section 3 of the Clayton Act. Two of the then lease provisions, the full capacity clause* and the surplus machines provision,** were held not to be unreasonable as such (234 Fed. 127, 151 and 264 Fed. 138, 167), although the district court did not inquire into their operation.

Thus, by 1922 United had been told by this Court that its ownership of patents gave it no right to include in its leases anti-competitive provisions. United was not deterred. Rather it persisted in its efforts to tie shoe manufacturers to it and thus to exclude competitive manufacturers of machines. This it accomplished by its lease-only policy and by the restrictive provisions of its leases and the policies it followed in its dealings with its lessees.

By the time the Government action was instituted the patent protection on which United relied so heavily in the earlier case had been largely, if not entirely, dissipated, the district court finding:

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* ". . . Subject to the foregoing limitations, the lessee shall use the leased machinery to its full capacity upon all boots, shoes, or other footwear, or portions thereof, made by or for the lessee in the manufacture or preparation of which such machinery is capable of being used." (234 Fed. 127, 131)

** "In case the lessee, at any time, shall have in his factory more machines adapted for doing the same work as any machine or machines hereby leased than in the opinion of the lessor are sufficient for performing the work which the lessee has in his factory, based upon the capacity of such machines and the number and kind of boots, shoes and other footwear made by the lessee for any period of twelve (12) consecutive months next preceding, the lessor may, at its option, upon thirty (30) days' notice in writing to the lessee, terminate the lease and license herein contained and in respect to such of the said machines as in the opinion of the lessor are unnecessary." (234 Fed. 127 at 132)

> "The evidence does not permit of specific findings as to the technical scope, the legal strength, or the commercial value of the individual patents. It is, however, plain that most of the patents on the fundamental inventions have expired, and that most existing patents do not technically prevent the accomplishment of the same result in another way. Thus, it is clear that United's present dominance does not rest primarily on patents." (110 F. Supp. at 333)

In the Government action the lease provisions and the leasing policies found violative of the law were different from those set aside in the 1922 Clayton Act case. United no longer referred to itself as offering to "lease and license," but only to "lease."* Of the clauses involved in the 1922 case, only the two mentioned above remained, now in slightly modified form. Of those, the surplus machines provision was of no moment, 110 F. Supp. 295, 317, but the full capacity clause, 110 F. Supp. at 315 was held to have been applied by United in discriminatory fashion which deterred the use of competitive machinery, *id.* at 320-321, and its continuance was enjoined, *id.* at 352.

Far from United operating under the "shelter of Supreme Court approval" (A 206) 377 F.2d 788, at no time did this court or any other court hold that United, with its 89% to 100% monopoly, had a right in law to follow a policy of leasing, not selling, the more important machines or of leasing them under terms which were anti-competitive both in intent and effect. It was not until 1955 that United's lease-only policy ended and then only because of this Court's affirmance of the order against United.

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* Compare lease provision in 234 Fed. 127, 132 with similar provision set out in 110 F. Supp. 295, 317.

We do not find in this conduct the situation that the Court of Appeals describes of "businessmen" who "must rely upon counsel, who in turn are guided by the existing precedents in making difficult decisions on the effect of the antitrust laws on specific business conduct" (A 207) 377 F.2d 789. There is no claim by United in this record that it relied on counsel. There is not a scrap of evidence on this point nor was any such contention made on its behalf. On the contrary, United, we submit, made its own precedents as a party defendant and conformed its conduct only as court orders required and only to the extent required.* These were not "difficult decisions." They were required decisions.

The Court of Appeals, in addition, disregarded antitrust decisions of long standing in which the plea of reliance on counsel and precedents had been rejected. In *Standard Sanitary Mfg. Co.* v. *United States,* 226 U.S. 20 in 1912 the principal individual defendant, Wayman, urged that he "and the manufacturers were advised by able and competent lawyers of the legality of their plan" and the form of patent liecnse "followed the precedents," *id.* at 39. These declarations of good motives were of no avail.

*Straus* v. *Victor Talking Machine Co.,* 297 Fed. 791, 794 (2d Cir. 1924) presented a situation in which defendant

* For example, Brown, president of United, received a committee of shoe manufacturers in 1950 which, among other points, asked that United consider making certain machines, then offered on a lease-only basis, available on an optional lease or outright purchase basis. Brown's response was that "our whole leasing system is under attack by the government in the anti-trust suit," and he declined "to discuss or consider any change which would affect our leases or leasing policies until the Court has handed down its decision." (A 480-483; A 607-618.)

Sheppard, president of Hanover, was spokesman for the committee of shoe manufacturers (A 482).

Victor patterned its new marketing plan, announced on August 1, 1913, upon the decision of this Court on May 26, 1913 in *Bauer & Cie* v. *O'Donnell*, 229 U.S. 1. This explicit evidence was to no avail. Victor's plan was declared to be illegal in 1917 in *Straus* v. *Victor Talking Machine Co.*, 243 U.S. 490. In Straus' treble damages action that followed, Victor's claim of reliance on the 1913 decision in *Bauer* v. *O'Donnell* was merely noted in the opinion of the Circuit Court of Appeals, 297 Fed. at 794. It had no legal significance. Judgment for treble damages was affirmed.* The illegality of Victor's marketing plan, despite Victor's reliance upon an earlier decision, was established in the 1917 decision of this Court, 243 U.S. 490.

We find no "injustice" to United in the award to Hanover of the damage it sustained and proved throughout the period of limitations. We find nothing in the legal position of United following loss of the Government case that requires that Hanover's claim for damages be cut off on the date of the *American Tobacco* decision in 1946. United's share of the market and its exclusionary lease-only policy were the same before and after that decision and throughout the period of limitations in Hanover's present case.

There was a substantial body of authoritative antitrust law long before 1946 that gave ample notice to any company that held from 89% to 100% of a market and that had for years engaged in exclusionary conduct that it

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* *Id.* Damages were allowed for the period from May 1, 1914 (the date when Victor cut off plaintiff Macy because Macy would not sign the agreement for Victor's new new marketing plan) to May 29, 1917 (the date when Victor's marketing plan was terminated following the decision on April 9, 1917 of this Court in Straus v. Victor Talking Machine Co., *supra*, declaring it to be illegal), 297 Fed. at 795-96.

might surely be required to bring its affairs into conformity with the law. United, however, chose to await the final decision of this Court in 1955. Then and only then did it change its exclusionary policy not by choice but because it was confronted with a court order that had been affirmed by this Court.

## CONCLUSION

For all of the reasons stated above, Hanover asks that:

1. the amended judgment of the Court of Appeals dated June 7, 1967 be reversed in so far as it

   (a) orders and adjudges that the judgment of the District Court dated August 13, 1965 be vacated as to damages and a new trial awarded limited to damages, and

   (b) orders that the award of counsel fees by the District Court be vacated and that said award be recomputed,*

2. the Court of Appeals be directed to affirm the judgment of the District Court dated August 13, 1965; and

---

* The award of counsel fees by the District Court was vacated by the Court of Appeals only because it had reduced the period for which damages were to be awarded and had ordered a retrial as to damages to take account of the claimed tax benefits to Hanover on account of leasing. The Court of Appeals directed that counsel fees be redetermined in the light of whatever damages the District Court might find on rehearing (A 217) 377 F.2d 793. There will be no need to recompute damages if this Court sustains Hanover's contentions on these points. It follows that there will also be no need to recompute counsel fees. Hanover, therefore, asks that the amended judgment of the Court of Appeals be reversed in so far as it orders that the award of counsel fees by the District Court be vacated.

3. said amended judgment of the Court of Appeals be affirmed in so far as it provides for a reconsideration by the District Court of the issues raised before the Court of Appeals, not decided by the Court of Appeals, and not in issue before this Court, with respect to Hanover's cross-appeal from the judgment of the District Court in so far as said judgment excludes from the damage calculation damages with respect to one machine, United's Goodyear Outside Rapid Lockstitch Machine.

Respectfully submitted,

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Dated: November 24, 1967

SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
DEC 22 1967
JOHN F. DAVIS, CLERK

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1967

No. 335

THE HANOVER SHOE, INC.,
*Petitioner,*

*v.*

UNITED SHOE MACHINERY CORPORATION,
*Respondent.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

## BRIEF FOR RESPONDENT

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December 22 1967

## TABLE OF CONTENTS


| | PAGE |
|---|---|
| RE-STATEMENT OF QUESTIONS PRESENTED (RULE 40) | 1 |
| RE-STATEMENT OF THE CASE (RULE 40) | 2 |
| 1. AS TO THE TAX ADVANTAGES OF LEASING (Hanover br. 11-24) | 5 |
| 2. AS TO RETROACTIVE APPLICATION OF THE GOVERNMENT DECREE (Hanover br. 24-41) | 12 |
| A. Hanover's position in this Court is contradictory of the basis of recovery below | 13 |
| B. Until this Court endorsed the holding of *Alcoa* in *American Tobacco*, a single firm was held to monopolize only if it abused its power by predatory or unlawful conduct, of which Judge Wyzanski emphatically absolved United | 13 |
| C. The 1918 case in which this Court upheld United's lease-only policy did not lose its validity by the expiration of United's basic patents or by the passage of the Clayton Act | 25 |
| 3. AS TO SPECIFICATIONS OF RELIEF BY HANOVER WHICH ARE NOT PROPERLY BEFORE THE COURT (Hanover br. 41-42) | 26 |
| A. ORL damage exclusion | 27 |
| B. Counsel fee award | 28 |
| C. Other damage issues | 29 |
| D. Hanover's attempt to avoid retrial | 29 |
| CONCLUSION | 29 |

## TABLE OF CASES


PAGE

*American Column & Lumber Co.* v. *United States* 257 US 377 ..... 23

*American Tel. & Tel. Co.* 9 FCC 2d 30, rehearing denied 9 FCC 2d 960 ..... 9

*American Tobacco Co.* v. *United States* 328 US 781 ..2, 12-15, 19-20, 24-25

*Bauer & Cie* v. *O'Donnell* 229 US 1 ..... 24

*Beggs* v. *Dougherty Overseas, Inc.* 287 F. 2d 80 .... 10

*Chesapeake & Potomac Tel. Co.* 6 P. U. R. 3d 222 .. 9

*Commercial Trust Co.* v. *Barnard* 27 N. J. 332, 142 A. 2d 865 ..... 9

*International Harvester Co.* v. *Missouri* 234 US 199 .. 24

*Standard Sanitary Mfg. Co.* v. *United States* 226 US 20 ..... 25

*Straus* v. *Victor Talking Mach. Co.* 243 US 490 .... 24

*Straus* v. *Victor Talking Mach. Co.* 297 Fed. 791 .... 24

*Tri-Continental Corp.* v. *Battye* 31 Del. Ch. 523, 74 A. 2d 71 ..... 9

*United States* v. *Aluminum Co. of America* 148 F. 2d 416 .....12-15, 17-20, 24

*United States* v. *American Can Co.* 230 Fed. 859, 234 Fed. 1019, appeal dismissed on motion of United States 256 US 706 ..... 17

*United States* v. *E. I. du Pont de Nemours & Co.* 351 US 377 ..... 19

*United States* v. *Griffith* 334 US 100 ..... 19

*United States* v. *International Harvester Co.* 274 US 693 .....15-16

*United States* v. *Keystone Watch Case Co.* 218 Fed. 502, appeal dismissed on motion of United States 257 US 664 ..... 17

PAGE

*United States* v. *Paramount Pictures, Inc.* 334 US 131 19

*United States* v. *Patten* 187 Fed. 664, rev'd in part, 226 US 525 ..... 24

*United States* v. *Reading* Co. 253 US 26 ..... 24

*United States* v. *Southern Pac. Co.* 259 US 214 ..... 24

*United States* v. *Swift & Co.* 286 US 106 ..... 16-17, 24

*United States* v. *Union Pac.* R. R. 226 US 61 ..... 24

*United States* v. *United Shoe Mach. Co.* 222 Fed. 349, aff'd 247 US 32 ..... 20-22, 25-26

*United States* v. *United Shoe Mach. Co.* 234 Fed. 127, 264 Fed. 138, aff'd in part 258 US 451 ..... 22-23, 26

*United States* v. *United Shoe Mach. Corp.* 110 F. Supp. 295, aff'd *per curiam* 347 US 521 ..... 13-14, 17, 22, 26

*United States* v. *United States Gypsum Co.* 333 US 364 25

*United States* v. *United States Steel Corp.* 251 US 417 ..... 15-16

## STATUTES

Clayton Act § 4, 38 Stat. 731 (1914), 15 USC § 15 6

Sherman Act § 2, 26 Stat. 209 (1890), as amended 69 Stat. 282 (1955), 15 USC § 2 ..... 13, 20, 25

## OTHER AUTHORITIES

Anthony, Shoe Machinery: Buy or Lease? (Rev. ed. 1955) ..... 6-8, 30-32

Bower, Herringer & Williamson, *Lease Evaluation,* 41 Accounting Rev. 257 (1966) ..... 6

45 Colum. L. Rev. 655 (1945) ..... 18

Gant, *Illusion in Lease Financing,* Harv. Bus. Rev. March-April 1959 at 121 ..... 6

Hale, *Size and Shape: The Individual Enterprise as a Monopoly,* 1950 U. Ill. L. F. 515 ..... 18

PAGE

Hale & Hale, Market Power: Size and Shape Under the Sherman Act (1958) ..... 18

Harbeson, *The Present Status of the Sherman Act,* 39 Mich. L. Rev. 189 (1940) ..... 17

Harbeson, *A New Phase of the Antitrust Law,* 45 Mich. L. Rev. 977 (1947) ..... 18

Jackson & Dumbauld, *Monopolies and the Courts,* 86 U. Pa. L. Rev. 231 (1938) ..... 17

Levi, *The Antitrust Laws and Monopoly,* 14 U. Chi. L. Rev. 153 (1947) ..... 18

Mason, *Monopoly in Law and Economics,* 47 Yale L. J. 34 (1937) ..... 17

Restatement (Second), Trusts (1959) ..... 9

Rostow, *The New Sherman Act: A Positive Instrument of Progress,* 14 U. Chi. L. Rev. 567 (1947) ..... 18-19

3 Scott, Trusts (3 ed. 1967) ..... 9

Stocking & Watkins, Monopoly and Free Enterprise (1951) ..... 18

Vancil, *Lease or Borrow—New Method of Analysis,* Harv. Bus. Rev. Sept.-Oct. 1961 at 122 ..... 6

54 Yale L. J. 860 (1945) ..... 18

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# Supreme Court of the United States

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THE HANOVER SHOE, INC.,
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*Respondent.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

## BRIEF FOR RESPONDENT

This brief answers the brief of petitioner The Hanover Shoe, Inc. dated November 24 1967 and supplements respondent's brief as petitioner in No. 463 dated November 22 1967 (consolidated herewith for argument). Review in No. 335 is limited to the treatment of income taxes in the damage calculation and the extent of retroactivity to be accorded to the Government decree underlying this private antitrust suit.

### Re-Statement of Questions Presented (Rule 40)

The statement of "Questions Presented" in the Hanover brief pp. 3-4 is inaccurate by reason of assumptions

and argumentative matter therein, and should be re-stated as follows:

1. Where in a private antitrust case the existence of injury or damage depends upon a comparison of actual cost of leasing shoe machines with an estimated cost of purchasing the same machines, is not any tax saving realized by deduction from income of lease payments as business expenses a necessary element in making such comparison?

2. Whether or not it should have accorded any retroactivity at all to Judge Wyzanski's decree of 1953, was not the Court of Appeals at least correct in holding that this Court's decision in the *American Tobacco* case on June 10 1946, 328 US 781, enunciated a change in the law of monopolization and that imposition of the penalty of treble damages retroactive to any earlier date would be unjust?

**Re-Statement of the Case (Rule 40)**

Even as limited for purposes of the two questions presented by the Hanover petition for certiorari, its "Statement of the Case" at brief pp. 4-7 requires correction as follows:

(i) In the process of determining whether the purchase of shoe machines would have cost Hanover more money than leasing actually did, the District Court eliminated from the calculation Hanover's actual tax benefits from the lease payments in the form of business expense deductions. This factor is omitted from Hanover's Statement of the Case. At the same time the District Court rejected Hanover's claim that the leasing charges were excessive because the Government decree, "on which Hanover relied, had made no finding

that United's leasing charges were excessive", and Hanover did not appeal from this holding of the District Court (377 F. 2d at 780, A. 189).

(ii) The statement at br. 6 with respect to the damage period of 1939-55 that "There is no dispute as to this" is wrong. There is a sharp dispute both on the point of retroactivity (our brief in No. 463 pp. 43-52) and on the limitations defense pursuant to which this action was barred at least by 1918 (our brief in No. 463 pp. 66-71). What Hanover means is that tolling for purposes of the Pennsylvania six-year statute would carry that statute back to July 1 1939.

(iii) The statement at br. 6 about the Court of Appeals' alleged decision "to reduce the amount of the damages by the amount of the reduction in taxes . . ." embodies Hanover's chronic fallacy. Rather, the Court of Appeals was concerned with "damages resulting from the choice of one over another course of action in both of which the tax impact necessarily was a matter of contemporaneous consideration and significance" (377 F. 2d at 792, A. 214). Hanover cannot justly say that the deduction for income taxes reduces its "damages", because (as shown below pp. 5-12) no damage exists until the income tax as well as all other consequences of the lease form of payment have been ascertained and compared with the consequences of purchase.

(iv) Hanover's implication at br. 6 that the Court of Appeals vacated the District Court's judgment only as to damages is inaccurate; Hanover also asks at br. 41 that the Court of Appeals be reversed for having vacated the District Court's award of counsel fees. Since Hanover omits in its Statement of the Case any reference to the counsel fee award (to which no reference was made in

Hanover's petition), a brief treatment of the facts follows. The District Court awarded (at United's expense) $650,000 counsel fees—$600,000 to Hanover's New York counsel, equivalent to $74 per hour of partners' time and $37 per hour of associates' time, and $50,000 to Pennsylvania counsel, at $50 per hour for the one partner involved (245 F. Supp. at 305, A. 171-72).[1] United criticized the amount as excessive, and the Court of Appeals vacated the award and remanded to the District Court for recomputation in light of the shortened damage period, noting that the award had been based in part on a "percentage of the recovery" (377 F. 2d at 793, A. 217).

(v) Hanover has raised still a further issue in its request for relief (br. 42) to which no reference is made either in its Statement of the Case or in its petition. The District Court excluded from the damage calculation United's Goodyear Outsole Rapid Lockstitch machine ("ORL") on the ground that such machines could have been substituted for by comparable machines of non-United manufacture. Because it had shortened the damage period from 1939-55 to 1946-55, the Court of Appeals deemed it premature to "pass on the sufficiency of the present record to justify the conclusion" that the Landis Stitcher was a satisfactory substitute and hence that the ORL machine should be excluded from the damage calculation (377 F. 2d at 793, A. 216). Accordingly, that court remanded the issue to the District Court for the taking of further evidence which would permit the allocation to the shortened damage period of the amount of damages involved in the ORL issue.

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[1]Hanover had contracted with its New York counsel to pay them 20% of any recovery, with a minimum of $25 per hour (245 F. Supp. at 304-05 and n. 19, A. 170-71).

**1. AS TO THE TAX ADVANTAGES OF LEASING (Hanover br. 11-24).**

While its claim of damage "is the excess of leasing costs over what it would have cost to own the same machines" (as phrased by the District Court, 245 F. Supp. at 287, A. 81), Hanover nevertheless makes the surprising argument that the tax advantages of leasing should be ignored in the comparison. This argument conflicts not only with the asserted basis for United's liability but also with business reality.

The asserted basis for United's liability is, in the words of the Court of Appeals, "that Hanover would have chosen to buy rather than lease the machinery". The business reality is that "in making such a determination a business of any size necessarily must give consideration to the tax elements inherent in the two alternatives from which the choice must be made" and that "the excess of one over the other of the two alternatives of purchase or lease should not be artificially inflated by ignoring the impact of taxation", 377 F. 2d 792, A. 214.

This business reality was recognized by Hanover's investment banker, Robert R. Spence (A. 587):

> "Q. What other factors must be considered [in choosing between leasing and purchasing]? A. Well, as we said, return—in other words, the arithmetic of it—if we have a piece of equipment that costs X number of dollars and we can rent it for a certain term at a certain figure, or we can put the capital in and buy it—now, which is going to be more favorable to us? In other words, can we buy this and earn enough on it so that we are better than if we rented it and paid all these rentals on it?
>
> Q. I am just trying to get you to tell us what you take into account in the arithmetic, and let me

ask you some leading questions. Would you take into account depreciation? A. Yes, sir.

Q. Taxes? A. As a refinement, yes.

Q. Refinement? Isn't that a prime element, the taxes? A. Yes."

Hanover's economic expert witness Richard M. Cyert did not deny the relevance of taxes but simply stated that he had "not investigated" the damage calculations "with respect to those issues" (A. 575-76).

It is universally recognized by management experts and businessmen that in deciding whether to lease or purchase equipment a business must take into account the tax advantages and disadvantages of each alternative. See e.g. Anthony, *Shoe Machinery: Buy or Lease?,* at 34-36 (Rev. ed. 1955); Bower, Herringer & Williamson, *Lease Evaluation,* 41 Accounting Rev. 257 (1966); Gant, *Illusion in Lease Financing,* Harv. Bus. Rev. March-April 1959 at 121, 126-27; Vancil, *Lease or Borrow—New Method of Analysis,* Harv. Bus. Rev. Sept.-Oct. 1961 at 122, 127. For example, an annual before-tax leasing cost of $160 is meaningless in relation to a before-tax purchase cost of $100 for the same item if the tax impact reduces the actual leasing cost to $80 and the purchase cost to $90. Ignoring the tax consequences in this example would make it appear that the lessee had lost $60 by leasing instead of purchasing, when in fact he had saved $10. Thus the lessee in this example would in no sense be "injured in his business or property" as contemplated by Clayton Act § 4, 38 Stat. 731 (1914), 15 USC § 15; but a court which disregarded tax consequences, as Hanover urges, would award the lessee $60 trebled, or $180. In a business framework which recognizes taxes as an inevitable component of any transaction, the refusal to take them into account in Hanover's damage calculation is inexcusable, and the statement that Han-

over's "damages are reduced by the imposition of taxes on what would have been additional income" (br. 13) is nonsensical. The existence *vel non* of "damages" cannot be determined until the tax effect has been measured.

While obvious in itself, this point is clearly stated in the very context of the case at bar by Professor Anthony of the Harvard Business School in the brochure above cited. That was a study prepared by Professor Anthony at the request of the National Shoe Manufacturers Association on the basis of the background material which he developed for the negotiations[2] conducted by the Association with United Shoe Machinery Corporation on the prices for outstanding machinery pursuant to par. 9 of the decree. The study discusses the elements to be considered by shoe manufacturers in deciding whether to buy or lease their machinery, pointing out that the technique for solving this problem with respect to used machinery

> "... is essentially the same as the technique that applies to the problem of new machinery" (p. 10).

In explaining a form of worksheet suggested for the computation of lease cost vs. purchase cost, Anthony says (p. 34):

> "We next are going to figure the savings after income taxes, since these are the only savings that

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[2]These are the same negotiations as are referred to at pp. 54-55 of our brief in No. 463 quoting Def. Ex. 34, A. 653. A fuller description of Dr. Anthony's function and procedure is given in the preface to his book, reprinted as an appendix to this brief, over the signature of Samuel L. Slosberg, President of the National Shoe Manufacturers Association. Also in the appendix is the membership of the Technical Committee of the NSMA containing the names of *two Hanover executives*. As indicated in Mr. Slosberg's preface it was the Technical Committee (including Hanover's president) who asked Dr. Anthony to make the study and who received his recommendations not only as to the place of taxes in the purchase-lease equation but also as to the significance of cost of capital.

you can pay bills with. In order to estimate the *additional income tax that will be paid if the machine is purchased,* we first need to reduce the annual cash savings (Item 23) by the depreciation that will be allowed for tax purposes if the machine is purchased." (Emphasis supplied)

Judge Wyzanski himself recognized the advantage to the lessee of tax deductions, as follows:

> "Taking into consideration the present tax structure of the United States, the leasing system, as Mr. Proctor pointed out, enables the lessor to take depreciation on the machine and use it as a tax deduction, and allows the lessee of the machine to take as a deduction as a business expense the rentals he paid, which are in one sense the economic equivalent, in part, of depreciation.
>
> Thus, there arises an overall situation in the industry which is to the tax advantage of the shoe machinery owners, plus shoe machinery lessees, and thus redounds, presumably, to the ultimate benefit of wearers of shoes in a way in which the conditional sales system would not."[8]

Hanover's statement of the tax issue shows a fundamental misunderstanding of the holding of the Court of Appeals. Hanover repeatedly states that the Court of Appeals held that "Hanover's damages should be reduced" by the net tax benefits of leasing (br. 7, see also br. 3-4, 13, 20, 22). On the contrary, the Court of Appeals held that the tax consequences of leasing and purchasing must be taken into account in determining *whether Hanover was*

[8]P. 12367 of the transcript in the Government case, hearing of May 25 1951.

*damaged at all,* and if so to what extent. It is the unusual nature of the claimed injury and damages, an excess of actual lease cost over an estimated purchase cost, which necessitates consideration of all factors, including the effect of Federal and state income tax deductions Hanover received for rental and royalty payments to United, depreciation of machines owned and the capital gains on the sale of any machines it sold at more than depreciated book value.

The courts have consistently held that in comparing two alternatives whose tax consequences differ the tax consequences of both alternatives must be taken into account. Thus, for example, the prudence of the investments chosen by a trustee must be judged with reference to their tax consequences for the beneficiaries of the trust. Restatement (Second), Trusts § 227, Comment *o* (1959); 3 Scott, Trusts § 227.12 (3 ed. 1967). The high tax brackets of the beneficiaries may therefore justify the choice of tax-exempt securities by the trustee. *Commercial Trust Co.* v. *Barnard* 27 N. J. 332, 142 A. 2d 865 (1958). For another example, prospective tax advantages such as loss carryovers must be considered in fixing a monetary equivalent for the value of the stock of a dissenting stockholder. *Tri-Continental Corp.* v. *Battye* 31 Del. Ch. 523, 74 A. 2d 71 (Sup. Ct. 1950). Again, regulatory commissions must weigh the reasonableness of a utility's choice between debt and equity financing by "taking into account the tax and other pertinent considerations." *Chesapeake & Potomac Tel. Co.* 6 P. U. R. 3d 222, 239 (D. C. Pub. Utils. Comm'n 1954), quoted in *American Tel. & Tel. Co.* 9 F. C. C. 2d 30, 84, rehearing denied 9 F. C. C. 2d 960 (1967). Finally, the Second Circuit held that an employee whose employment abroad was wrongfully terminated prior to the expiration of the eighteen months of residence abroad necessary to

obtain a lower tax rate on the income earned abroad might recover damages for the loss of this tax advantage. *Beggs* v. *Dougherty Overseas, Inc.* 287 F. 2d 80 (CA 2 1961).

Authority in other areas therefore supports the conclusion of the Court of Appeals that the tax consequences of the alternatives of leasing and purchasing shoe machinery must be considered. None of the authorities cited by Hanover at pp. 16-20 of its brief involved a situation like this one, where the plaintiff claims it was injured by being denied the opportunity to choose an alternative means of dealing with the defendant, and the tax consequences of the two alternatives differ. None of them concerned a case where, in the words of the Court of Appeals, "tax consequences are so inherently a part of the choice which would be made", 377 F. 2d at 792, A. 214. Rather they are based on the proposition that injury is first inflicted and then a later event, such as taxation, is claimed to reduce the damages. In this case we are not concerned with a disassociated later event. Hence no decided case supports Hanover's contention that it should be allowed to calculate damages in this case as though the tax savings it enjoyed through leasing did not exist.[4]

The table set forth at pp. 14-15 of Hanover's brief also shows a basic misconception of the holding of the Court of Appeals. The designation of the first entry in the table, "Excess Rental Charges", is of course misleading because the trial court held the lease charges to be reasonable; a less misleading designation would have been "Difference in Before-Tax Costs of Leasing and Purchasing". The second entry in the table erroneously reflects a tax saving to Hanover through deduction on its income tax returns of the so-

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[4]Hanover argues at br. 12-13 that it did not take taxes into account in deciding whether to lease or buy United machines in 1955. This is irrelevant. The only question is whether in fact purchase was the more economical alternative.

called "Excess Rental Charges", when in fact Hanover was benefited by being able to deduct the *whole* of the lease charges.[5] Thus Hanover's argument of "double taxation", as well as its assertion that the holding of the Court of Appeals conflicts with precedent, rests on a misunderstanding of the holding below.[6]

Finally, Hanover argues at br. 20-24 that the holding of the Court of Appeals conflicts with the policy of the treble damage provisions. The short answer is that that policy is not advanced by disregarding actual cost savings so as to find damage where none exists in reality.[7]

We submit that the Court of Appeals was therefore correct in holding that the tax advantages of leasing must be taken into account in determining to what extent, if at all, Hanover was damaged by its inability to purchase United machines. When taken together with cost of capital considerations, treated in our brief in No. 463 at pp. 52-56, 61, the tax advantages of leasing made it in fact the more

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[5]The second entry would be appropriate only if United's lease charges had been found to be excessive, as Hanover originally contended. This fact distinguishes the decisions cited by Hanover, including that of Judge Goodrich cited at br. 16, since Judge Goodrich based his decision on the stipulated assumption that the rentals themselves were excessive (185 F. Supp. at 828) and the other cases also concerned excessiveness not involving a difference between lease and sale.

[6]The uniform 50% tax rate assumed in the table is also at variance with the record. The present corporate income tax rate, which would be applicable to any recovery, is 48%; the rate during the complaint period, including excess profits taxes, ranged as high as 98.7% (A. 664). Disregarding the tax advantages of leasing would accord Hanover a further windfall of the difference between the two rates.

[7]Hanover argues in the footnote at br. 22 that the determination of the tax benefit of leasing would be burdensome for trial courts. But few if any cases would involve the novel theory of damages urged here, and in any event the calculations are not difficult. Also, Hanover's assertion of discrimination (br. 23) is specious. It is of no consequence that Hanover's damage may be different from others, since damages in a tort case usually vary from plaintiff to plaintiff.

advantageous alternative for Hanover. In the words of the Court of Appeals (377 F. 2d at 792, A. 215):

> ". . . It would be a distortion of reality to permit Hanover to recover damages on the ground that it would have bought machinery if it had been allowed to do so, without requiring it to give credit in its calculation of its damages for the savings which accrued to it from the tax advantages it received under the leasing system it now disowns and without also requiring it to reflect in its costs of ownership the taxes which such dominion would have imposed."

**2. AS TO RETROACTIVE APPLICATION OF THE GOVERNMENT DECREE (Hanover br. 24-41).**

We have argued in No. 463 that Judge Wyzanski's decree (the cornerstone of Hanover's claim to recovery), even if interpreted to condemn United's lease-only practice, should not be given retroactive application (brief dated November 22 1967 pp. 43-52). The Court of Appeals accepted this argument in part. It held, as had Judge Wyzanski in the underlying Government case, that this Court's decisions in 1913, 1918, and 1922 had permitted United to continue its lease-only policy, and that it could not be foreseen that United could be held to have monopolized before this Court's approval in the *American Tobacco* case (1946) of Judge Learned Hand's decision in *Alcoa* (1945). The Court of Appeals therefore held that it would be unjust to impose damages upon United retrospectively for the period before *American Tobacco*, 377 F. 2d at 787-90, A. 203-09. We submit that this holding is manifestly correct so far as it goes, and indeed that the principle embodied in the holding should govern the entire damage

period claimed by Hanover, on the ground that the decision in *Alcoa*, while itself a sharp break with earlier law, did not give United fair warning that the approved leasing system was a monopolizing practice.

**A. Hanover's position in this Court is contradictory of the basis of recovery below.**

Hanover does not directly contend for retroactivity. It does not defend the decision of the District Court that, assuming *Alcoa* to have represented a change in the law effective in 1945, this decision must still be given retroactive application for Hanover's purposes (245 F. Supp. at 272, A. 48-49). *If* there was a change in the law, as Judge Sheridan assumed and as Judges Wyzanski and Freedman held to have occurred, Hanover does not argue for retroactive application of the changed rule. Instead Hanover flatly contends that there was no change in the law; that the assumption of Sheridan J. and the holding of Wyzanski and Freedman JJ. were wrong; and that the antitrust law, changeless as the law of the Medes and Persians, had always condemned United's leasing practices.

**B. Until this Court endorsed the holding of Alcoa in American Tobacco, a single firm was held to monopolize only if it abused its power by predatory or unlawful conduct, of which Judge Wyzanski emphatically absolved United.**

After a careful review of the history of Sherman Act § 2,[8] Judge Wyzanski concluded in his opinion in the Government suit that until *Alcoa* predatory conduct was an indispensable element of monopolization:

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[8]Both the Government and United, at Judge Wyzanski's request, submitted memoranda on the history of Sherman Act § 2. See Brief for the United States on Liability, pp. 1-26; Discussion of the History of the Sherman Act Submitted by the United Shoe Machinery Corporation.

> "Early Supreme Court decisions went in different directions, until Mr. Justice White announced 'the "rule of reason" ' in 1911 in Standard Oil Co. of New Jersey v. United States, 221 U. S. 1, 31 S. Ct. 502, 531, 55 L. Ed. 619, and United States v. American Tobacco Co., 221 U. S. 106, 31 S. Ct. 632, 55 L. Ed. 663. *His opinions encouraged the view that there was no monopolization unless defendant had resorted to predatory practices.* And this was unquestionably the view to which Mr. Justice McKenna led the Court in United States v. United Shoe Machinery Company of N. J., 247 U. S. 32, 38 S. Ct. 473, 62 L. Ed. 968 and United States v. United States Steel Corp., 251 U. S. 417, 40 S. Ct. 293, 64 L. Ed. 343. But a *reversal of trend* was effectuated through the landmark opinion of Judge Learned Hand in United States v. Aluminum Co. of America, 2 Cir., 148 F. 2d 416." 110 F. Supp. at 341 (Emphasis supplied)

Judge Wyzanski added that the record showed

> "... that United's power does not rest on predatory practices. Probably few monopolies could produce a record so free from any taint of that kind of wrongdoing." *Id.* at 345

It follows, as Judge Wyzanski stated in rejecting the more drastic of the Government's proposed remedies, that—

> "Until Alcoa lost its case in 1945, there was *no significant reason to suppose* that United's conduct violated § 2 of the Sherman Act." *Id.* at 348 (Emphasis supplied)

The Court of Appeals in the case at bar agreed with this conclusion and therefore held that treble damages should

not be imposed upon United for the period prior to this Court's approval of certain language from *Alcoa* in *American Tobacco* (see 377 F. 2d at 788-89, A. 204-06).

Hanover contends, however, that *Alcoa* represented "no new rule of law" and that even before *Alcoa* non-predatory conduct by a single dominant firm constituted monopolization (br. 28-30). This contention is based on a studied ignoring of the decisions cited by Judge Wyzanski, which show that until *American Tobacco* this Court held that a single firm monopolizes only by predatory or unlawful conduct. Thus Judge Wyzanski cited *United States* v. *United States Steel Corp.* 251 US 417, 451, where this Court had stated that

> ". . . the law does not make mere size an offence or the existence of unexerted power an offence. It, we repeat, requires overt acts and trusts to its prohibition of them and its power to repress or punish them. It does not compel competition nor require all that is possible."

Mr. Justice Day, although dissenting, agreed that monopolization required unlawful conduct:

> "[A defendant] is entitled to maintain its size and the power that legitimately goes with it, provided no law has been transgressed in obtaining it." *Id.* at 460-61.

In *United States* v. *International Harvester Co.* 274 US 693, 707-08, this Court observed that the defendant had not sold below cost to drive out competitors or attempted to set industry prices, and held that absent such predatory conduct it had not monopolized:

> "The law, however, does not make the mere size of a corporation, however impressive, or the existence of

> unexerted power on its part, an offense, when unaccompanied by unlawful conduct in the exercise of its power. *United States* v. *Steel Corporation,* 251 U. S. 417, 451. And the fact that competitors may see proper, in the exercise of their own judgment, to follow the prices of another manufacturer, does not establish any suppression of competition or show any sinister domination. *United States* v. *Steel Corporation, supra,* 448." *Id.* at 708-09.

The *Steel* and *Harvester* cases were cited and followed in a passage from *United States* v. *Swift & Co.* 286 US 106, 116, only the last sentence of which Hanover chooses to quote at br. 30:

> "The second reason stated in the bill of complaint is the practice followed by the defendants of fixing prices for groceries so low over temporary periods of time as to eliminate competition by rivals less favorably situated.
>
> Whether the defendants would resume that practice if they were to deal in groceries again, we do not know. They would certainly have the temptation to resume it. Their low overhead and their gigantic size, even when they are viewed as separate units, would still put them in a position to starve out weaker rivals. Mere size, according to the holding of this court, is not an offense against the Sherman Act unless magnified to the point at which it amounts to a monoply (*United States* v. *United States Steel Corp.,* 251 U. S. 417; *United States* v. *International Harvester Co.,* 274 U. S. 693, 708), but size carries with it an opportunity for abuse that is not to be ignored when the opportunity is proved to have been utilized in the past."

Hanover implies (br. 30) that the term "abuse" in the last sentence quoted can be applied to United's lease clauses, which Judge Wyzanski found were "honestly industrial", 110 F. Supp. at 344, and non-predatory, *id.* at 345, although exclusionary. The full passage quoted makes it clear what "abuse" this Court was referring to: destructive price-slashing for the purpose of eliminating competitors. The requirement of predatory conduct for monopolization, far from being weakened as Hanover suggests, was reaffirmed by this Court's emphasis in *Swift* upon the assertedly predatory acts of the defendants.

Lower Federal courts uniformly held until *Alcoa* that unlawful or predatory acts were an essential element of monopolization by a single firm. E.g. *United States* v. *American Can Co.* 230 Fed. 859, 902, 234 Fed. 1019 (D. Md. 1916), appeal dismissed on motion of United States 256 US 706 ("attempt to restrain trade or monopolize industry"); *United States* v. *Keystone Watch Case Co.* 218 Fed. 502, 518 (ED Pa. 1915), appeal dismissed on motion of United States 257 US 664 ("fraudulent or unfair or oppressive rivalry"). This was also the view of commentators before *Alcoa.*[9] Professor Mason wrote in *Monopoly in Law and Economics,* 47 Yale L. J. 34, 43 (1937):

> "The size of the combination or its share of the total output of a product became important only when accompanied by predatory practices affecting the freedom of others to compete."

Commentators upon *Alcoa* likewise recognized that it broke sharply with the previous requirement of predatory

[9]E.g., Harbeson, *The Present Status of the Sherman Act,* 39 Mich. L. Rev. 189, 203-04 (1940); Jackson & Dumbauld, *Monopolies and the Courts,* 86 U. Pa. L. Rev. 231, 247 n. 64 (1938); Mason, *Monopoly in Law and Economics,* 47 Yale L. J. 34, 43, 45 (1937).

or blameworthy conduct. Professor Eugene V. Rostow hailed *Alcoa* as the embodiment of a "New Sherman Act". Rostow, *The New Sherman Act: A Positive Instrument of Progress,* 14 U. Chi. L. Rev. 567, 577 (1947). Other commentators recognized its innovative character.[10] Professor Levi, subsequently Dean of the University of Chicago Law School and now President of that University, concluded in *The Antitrust Laws and Monopoly,* 14 U. Chi. L. Rev. 153, 160, 174 (1947) (footnote omitted):

> "The abuse theory which the *Steel* and *Harvester* cases fashioned onto the act was really the notion that only alarming and ungentlemanly conduct—involving, for example, the use of slander concerning one's competitors, an insistence upon continued growth through price wars and resulting acquisitions, and in general the fist with the glove held in the other hand for the court to see—would be sufficient to invoke the Sherman Act against the crime of monopolizing.
>
> * * *
>
> The gap between the restraint of trade cases and the close combination or monopoly cases, however, has been considerably narrowed. This was done in the *Alcoa* case."

Similarly Professor Rostow said in *The New Sherman Act: A Positive Instrument of Progress,* 14 U. Chi. L. Rev. 567, 577 (1947) (footnotes omitted):

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[10]Hale, *Size and Shape: The Individual Enterprise as a Monopoly,* 1950 U. Ill. L. F. 515, 519-20; Harbeson, *A New Phase of the Antitrust Law,* 45 Mich. L. Rev. 977, 978-80 (1947); Levi, *The Antitrust Laws and Monopoly,* 14 U. Chi. L. Rev. 153, 159-60, 174 (1947); 45 Colum. L. Rev. 655 (1945); 54 Yale L. J. 860, 862 (1945). See to the same effect, e.g., Hale & Hale, *Market Power: Size and Shape Under the Sherman Act* § 2.7 (1958); Stocking & Watkins, *Monopoly and Free Enterprise* 288 (1951).

> "Two recent cases, against the background of the last ten years of the Sherman Act in the Supreme Court, mark the new birth of Section 2. The seeds of the doctrine appear in Judge Learned Hand's remarkable opinion in the *Aluminum* case; *American Tobacco Co.* v. *United States,* which explicitly approves and supports Judge Hand's opinion, in some respects carried it into new grounds."[1]

This Court's action since *Alcoa* also shows the revolutionary character of that decision. Two weeks after the decision in *Alcoa,* this Court granted certiorari in *American Tobacco Co.* v. *United States* 324 US 836 limited to the question "whether actual exclusion of competitors is necessary to the crime of monopolization", a question which the opinion in *Alcoa* had flatly answered "No". In its opinion in *American Tobacco,* which was a conspiracy and not a single-firm monopolization case, the Court went out of its way to state that it "welcome[d] this opportunity to endorse" certain language of *Alcoa* regarding single-firm monopolization. 328 US at 813. In the first post-*Alcoa* single-firm monopolization case to come before this Court, *United States* v. *Griffith* 334 US 100, 106-07, after stating that "those things which are condemned by § 2 are in large measure merely the end products of conduct which violates § 1" (i.e. of unlawful conduct), this Court explained that the combination of monopoly power with the intent to exercise it was also monopolization. In this portion of its discussion the Court cited only *Alcoa* and subsequent cases. The Court's more recent monopolization cases also cite only *Alcoa* and later cases for the proposition that non-predatory conduct by a single firm may constitute monopolization. E.g., *United States* v. *Paramount Pictures, Inc.* 334 US 131, 173; *United States* v. *E. I. du Pont de Nemours & Co.* 351 US 377, 425-26 (Warren C. J. dissenting).

Thus the uniform current of decision and the writings of commentators establish that predatory conduct was an essential requisite of single-firm monoplization until *Alcoa* and *American Tobacco*. Since concededly United has been guilty of no predatory conduct, the conclusion of Judge Wyzanski and the Court of Appeals that it could not be foreseen before *Alcoa* and *American Tobacco* that United's position was open to any question is plainly correct.

Even after *Alcoa* and *American Tobacco* United could not know that its leasing policy would be held a violation of Sherman Act § 2, as we have more fully argued in No. 463 (brief dated November 22 1967 pp. 46-48). This is so not only because of the special facts in those cases but because of United's apparently assured record of judicial approval. The holdings of this Court with respect to United's position are summarized at pp. 43-46 of our brief in No. 463, and Hanover's brief in referring to them (pp. 33-38) omits any reference to the direct holding that "the evidence disproves" coercion of shoe-makers and machinery makers by the United leases (247 US at 63).

The decisions of this Court as to United's position rested on an exhaustive examination of the United leases by the district courts. The three-judge statutory court convened in Massachusetts in 1915 went into the subject fully. Judge Putnam said, 222 Fed. 349, 361:

> "What we have submitted about the leasing system, and the propositions of the respondents which we have cited, and which cover so large a field, constitute an organization so successful in its operations, continuing so long a time, and so harmonious in its major parts, that anything which would bar out provisions in the leases and licenses necessary to the maintenance thereof must be admitted to be injurious to the manufacturers of shoes,

as well as to the manufacturers of machinery, with regard to what each justly desires to accomplish."

Judge Dodge said, *id.* at 370-71:

> "If there is any sense in which the result attained as above can be called a 'monopoly,' it does not follow, in view of the circumstances shown, that the defendants have either restrained trade or been guilty of monopolizing or attempting to monopolize within the meaning of the act. Nor can I regard the case as one in which any presumption arises, from the fact that so large a proportion of the users of these machines use the defendants', that the defendants have committed any of the above forbidden acts in accomplishing the above result. The proof is too complete that it has been in fact reached by the use of methods entirely lawful, the leading features whereof are below indicated."

and again, p. 391:

> "Not only would it have been unreasonable, as has been said, to expect the defendants to substitute a wholly different system from the leasing system which they found in use, but the evidence affords no reason to believe that anything of the kind was desired by manufacturers in general. The advantages to them of not having to tie up capital in patented machines, and of paying for the privilege of their use only according to the amount of use, were advantages which they cannot be supposed desirous of surrendering.
>
> Modifications in the contracts offered them tending, as these are shown to have done, to enable the company, through provisions adapted to increase

> the number of shoes worked on by each machine, to lessen the royalty charged per pair, and to diminish or dispense with the initial payment before required, were so obviously prompted by the purpose of developing the company's business through the perfectly legitimate method of offering them on terms more advantageous to users, that it would be unjust to treat them, on evidence no stronger than that here presented, as really intended to accomplish an arbitrary exclusion of users from any dealings with others."

Likewise Judge Brown concluded, *id.* at 401:

> "While in the early stages of the case there were some criticisms of any leasing system as opposed to a system of selling, the very great advantages to shoe manufacturers in general of being provided with machine equipment of the highest efficiency, and of being relieved of individual effort in that most costly and difficult part of manufacturing, and the general satisfaction with the system were so overwhelmingly proved, that all doubt that the leasing system in general is unimpeachable has been removed."

This decision, which was affirmed in 247 US 32 (1918), approved the full-capacity clause of the standard United lease, a clause which Judge Wyzanski found to be a deterrent to competition in 1953 (110 F. Supp. at 340). Yet in the interval another district court in the Clayton Act case had again approved this clause. Judge Trieber held in 234 Fed. 127, 151:

> "The court is unable to see anything unreasonable in these provisions [i.e. the full-capacity clause and the excess machinery clause]. The only compensa-

> tion for the use of the machines provided in the leases is the royalty upon the shoes manufactured on them. To permit the lessees to retain more machines than are necessary for the manufacture of his product would result in the lessors receiving no compensation therefor, consequently no return on the investment. As these provisions are only to be enforced, if the machines are not used to their capacity for the period of 12 consecutive months, the court is unable to say that they are in violation of any provisions of the Clayton Act, *or can in any way tend to substantially lessen competition or create a monopoly.*" (Emphasis supplied)

This holding was confirmed upon the trial in 1920 (264 Fed. 138, 167, aff'd 258 US 451). The full-capacity clause did not come before this Court at the time only because the Government abandoned its own appeal. 254 US 666.

Hence United until 1953 was doubly assured of its compliance with the law: *first* by the fact that the test theretofore existing for monopolization did not make market predominance unlawful in the absence of aggressively anticompetitive conduct; and *second* by repeated rulings of the lower Federal courts and of this Court in its favor with respect to current leasing practices. The view entertained in this Court about United's position was stated by Mr. Justice Brandeis with the concurrence of Holmes and McKenna JJ. in the *American Column & Lumber Co.* case, 257 US 377, 419:

> ". . . in *United States* v. *United Shoe Machinery Co.*, 247 U. S. 32, the court held that it was not unlawful to vest in a single corporation control of practically the whole shoe machinery industry."

Nothing in the authorities cited by Hanover warrants ignoring this well-settled current of decision which legiti-

mized United's business policies until Judge Wyzanski for the first time in 1953 held them a violation in specified aspects (our brief in No. 463 pp. 27-29). Hanover's contention at br. 30 that United's exclusionary lease-only policy was the "abuse" envisaged by this Court in *United States* v. *Swift & Co.* 286 US 106, 116, is a mere play on words as we have demonstrated (pp. 16-17 above). The attempted analogy of *Straus* v. *Victor Talking Mach. Co.*, wherein a marketing plan held illegal in 243 US 490 was accepted as the basis for a treble damage award in 297 Fed. 791 (CA 2 1924) (br. 39-40), is specious. *Bauer & Cie* v. *O'Donnell* 229 US 1, on which plaintiff Victor purported to rely, did not approve the program for control by the patentee of resale prices of the article patented (229 US at 17), although Hanover wrongly implies that it did (br. 40).

In arguing that the *American Tobacco* case did not announce a new rule of antitrust law, Hanover cites five cases outside the area of monopolization by a single firm (br. 28-29). These involved combinations of competitors (the *Union Pacific, International Harvester, Reading* and *Southern Pacific* cases) and, in one instance, a conspiracy among competitors to monopolize (the *Patten* case). From these precedents Hanover argues that even before *Alcoa* a *single firm* whose monopoly power was lawful could be held to have monopolized in the absence of predatory conduct. Hanover implies (br. 29) that Judge Hand regarded these cases as precedent for his holding in *Alcoa*. On the contrary, Judge Hand relied upon these cases only for the proposition that "to have combined ninety per cent of the producers of ingot would have been to 'monopolize' the ingot market", from which he then reasoned by analogy. 148 F. 2d at 429. His opinion thus shows that he recognized that the prior standard distinguished between combinations or conspira-

cies, where the intent to monopolize was evident from the very fact that predominant power had been obtained by a combination or conspiracy, and the acquisition or retention of a monopoly position by a single firm, which was condemned only if accompanied by predatory practices. *American Tobacco Co.* v. *United States* 147 F. 2d 93, 110-11 (CA 6 1944), aff'd 328 US 781.

**C. The 1918 case in which this Court upheld United's lease-only policy did not lose its validity by the expiration of United's basic patents or by the passage of the Clayton Act.**

We have shown at pp. 43-46 of our brief in No. 463 that this Court in *United States* v. *United Shoe Mach. Co.* 247 US 32, 56-67 (1918), upheld United's lease-only policy. Hanover urges on two different grounds that this Court's approval of United's lease-only policy had lost its validity by 1939.

The first of these asserted grounds is that the decision was based upon the fact that United's machines were protected by patents, so that this Court "never reached a consideration of the effect of the lease restrictions" (br. 36). On the contrary, the Court's opinion makes it clear that the basis of its decision was its holding that United's leases did not, as charged, coerce or restrain either shoe manufacturers or shoe machinery manufacturers; see 247 US at 63, 66. Moreover, the possession of patents does not excuse monopolization or other violations of the Sherman Act. E.g., *United States* v. *United States Gypsum Co.* 333 US 364, 400; *Standard Sanitary Mfg. Co.* v. *United States* 226 US 20, 49.

The second asserted ground of distinction is that the passage of the Clayton Act should have warned United that its lease-only policy violated Sherman Act § 2. No prohibition of the Clayton Act was even arguably transgressed

by the lease-only policy, and the Government suit did not charge any violation of the Clayton Act; see 110 F. Supp. at 298.[11]

Judge Wyzanski was therefore clearly right in concluding, in a passage quoted with approval by the Court of Appeals in the instant case, 377 F.2d at 788, A. 205, that the 1918 case had "not yet lost all authority", 110 F. Supp. at 343. United therefore came to the Government suit justifiably relying upon this Court's holding that its lease-only policy was permissible.

### 3. AS TO SPECIFICATIONS OF RELIEF BY HANOVER WHICH ARE NOT PROPERLY BEFORE THE COURT (Hanover br. 41-42).

In its Conclusion Hanover raises two additional issues by way of specification of relief to which it deems itself entitled: (a) the appropriateness of the District Court's exclusion from the damage calculation of alleged damage with respect to United's ORL machine (see p. 4 above) and (b) the reasonableness of the District Court's $650,000 award of counsel fees. Neither issue is adverted to in Hanover's petition for certiorari, nor for that matter elsewhere in Hanover's brief. Accordingly, under Rules 23-1(c) and 40-1(d)(2) of this Court those issues are not properly before the Court.

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[11] Hanover's quotation from the legislative history of the Clayton Act (br. 35) suggests that its purpose in making this argument was to insert an irrelevant comment on United's lease clauses as they existed in 1914, i.e. before their modification as a result of the Clayton Act. Cf. United's change of the term of leases to meet the preferences of shoe manufacturers, 110 F. Supp. at 319. Whatever the Congressional committee thought of United's "monopoly" (a description not notably different from what Brandeis J. considered this Court had authorized, p. 23 above), surely the only significant fact is that Congress limited its attack to the tying clauses of the leases. These were removed in 1914, 258 US at 464.

We should not raise this point if the relief sought as to those two issues flowed naturally from the relief sought on the issues on which Hanover sought certiorari. As shown below, however, Hanover seeks relief inconsistent with its other requests for relief and incompatible with the decisions below—relief which would in effect (1) compel the District Court without appellate court guidance to reconsider the ORL issue notwithstanding that the District Court has fully considered and made findings on the issue in the very posture in which Hanover would have its judgment reinstated by this Court, and (2) deprive the Court of Appeals of any opportunity to decide whether the counsel fee award was reasonable.

**A. ORL damage exclusion.**

In view of its shortening of the damage period from 1939-55 to 1946-55 the Court of Appeals refrained from passing on "the sufficiency of the present record to justify the conclusion" that the Landis Stitcher was a satisfactory substitute and hence that the ORL machine should be excluded from the damage calculation (377 F. 2d at 793, A. 216). It remanded the issue to the District Court for the taking of further evidence which would permit the allocation to the shortened damage period of the amount of damages involved in the ORL issue since "on retrial the record may well be different from what is now before us." (*Ibid.*)

Hanover now asks in its third request for relief (br. 42) that such remand of the ORL issue for reconsideration by the District Court be affirmed, notwithstanding that in its second request on page 41 Hanover asks that the District Court's original judgment predicated upon the damage period of 1939-55 be reinstated. If the trial court's judgment were to be reinstated, clearly there would be no need for reconsideration by that court of the ORL issue, especi-

ally in the complete absence of appellate court guidance. It would simply be incumbent upon the Court of Appeals to resolve the question whether the record justified the conclusion reached by the District Court.

**B. Counsel fee award.**

The District Court's award of $650,000 counsel fees is $340,675 higher than what the minimum rate agreed to between Hanover and its New York counsel (see p. 4 above) would have produced. The excess reflects a contingent award calculated by the District Court as an additional charge against United instead of a contribution from the successful client's share.

Noting United's claim that the $650,000 award was "excessive", the Court of Appeals remanded the issue to the District Court for reconsideration in light of the appellate court's shortening of the damage period from 1939-55 to 1946-55 (377 F. 2d at 793, A. 217). Contrary to Hanover's suggestion in its footnote at page 41, the Court of Appeals in no sense passed on the reasonableness of the $650,000 fee award but simply deferred any such consideration until recomputation of the award by the trial court, a recomputation which presumably would materially lessen the award because the reasonableness of the award had been "tested" by the District Court "not only by the hours devoted to the case, but also by the percentage of the recovery in its original and trebled amounts." (377 F. 2d at 793, A. 217)

Hanover now contends in its footnote and in its request for relief number 2 on page 41 that this Court should bypass the Court of Appeals and affirm the $650,000 counsel fee award without permitting that court an opportunity to consider whether the award is reasonable—clearly improper relief.

**C. Other damage issues.**

A mandate directing the Court of Appeals to affirm the judgment of the District Court, as Hanover seeks, would also deprive the Court of Appeals of any opportunity to resolve important questions raised by United as to the validity of Hanover's damage calculations which the Court of Appeals found not "possible to adjudicate . . . on the present record" because of the retrial on damages necessitated by the shortening of the damage period; 377 F. 2d at 791, A. 212.

**D. Hanover's attempt to avoid retrial.**

In the absence of the dismissal or remand for certification prayed for in our brief in No. 463, a second trial of the damage issue would in any event be necessary. Hanover concedes (br. 6) that the damage period ending September 21 1955, on which the District Court founded its judgment, must be shortened to June 1 1955 as directed by the Court of Appeals, 377 F. 2d at 791, A. 211-12. Yet at br. 41 Hanover asks that "the Court of Appeals be directed to affirm the judgment of the District Court dated August 13, 1965". This is clearly out of the question. Any disposition contemplating the determination of damages must provide accordingly for a retrial reflecting this point.

**CONCLUSION**

On each of the five grounds stated in our brief in No. 463, the judgment of the District Court dated August 13 1965 and the amended judgment of the Court of Appeals dated June 7 1967 should be vacated and the complaint dismissed. Alternatively, with respect to certification of questions to the antitrust court and computation of cost of

capital in the damage calculation, reversal and remand would be required in the absence of dismissal.

To the extent not inconsistent with the resolution of the issues in No. 463, the amended judgment of the Court of Appeals dated June 7 1967 should be affirmed and that court directed to issue its mandate accordingly to the District Court for a retrial of the issues of damages and counsel fees.

Respectfully submitted,

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December 22 1967

# APPENDIX

**[Excerpts from Robert N. Anthony,
*Shoe Machinery: Buy or Lease?*
(Rev. ed. 1955).
See p. 7 *supra*.]**

## *Preface*

The court decree in the United Shoe Machinery Corporation case creates a new problem for many shoe manufacturers, that of deciding whether they should lease a given item of machinery or whether they should buy it. In an effort to assist its members in devising a sound approach to the solution of this problem, the Technical Committee of the National Shoe Manufacturers Association asked Dr. Robert N. Anthony of Andrews, Anthony & McLean to study the situation and make suggestions. This book is his report.

Dr. Anthony's procedure in studies of this type is to discuss the problem firsthand with businessmen who must cope with it. He and his associates have accordingly discussed machinery problems at length with a number of shoe manufacturers. His group, and the Committee, wish to express appreciation for the fine cooperation received from the persons visited and the many helpful suggestions that resulted from these discussions. In addition, the studies made by Andrews, Anthony & McLean in connection with the recently concluded negotiations with United Shoe Machinery Corporation on used machinery sales prices have provided useful background material.

Mr. Robert C. Erb, Chairman, and other members of the Technical Committee have worked closely with Dr. Anthony throughout the study and have been of great assistance. Mr. James H. Nolan, technical advisor to NSMA, has spent much time on this project, and his con-

tributions based on years of experience in the industry have been of inestimable help. The counsel of Mr. Charles H. Jones, past president, and Mr. Merrill A. Watson, executive vice president of NSMA, has also been most helpful.

The report does not give any pat answer to the problem, but rather emphasizes that the solution depends on each manufacturer's judgment, based on his analysis of his own situation. It is not appropriate for the Technical Committee or the National Shoe Manufacturers Association to take an official position on the suggestions contained in this booklet beyond recommending that they be studied carefully. As is customary, the author accepts responsibility for the statements made.

SAMUEL L. SLOSBERG,
*President, NSMA*

July, 1955

# TECHNICAL COMMITTEE

OF THE

# NATIONAL SHOE MANUFACTURERS ASSOCIATION

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National Shoe Manufacturers Association

SUPREME COURT, U. S.

FEB 27 1968

JOHN F. DAVIS, CLERK

IN THE

# Supreme Court of the United States

**OCTOBER TERM, 1967**

No. 335

THE HANOVER SHOE, INC.,
*Petitioner,*

*v.*

UNITED SHOE MACHINERY CORPORATION,
*Respondent.*

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS
FOR THE THIRD CIRCUIT

## REPLY BRIEF FOR PETITIONER THE HANOVER SHOE, INC.

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February 26, 1968

# INDEX


| | PAGE |
|---|---|
| I. Reply to United's arguments as to "The Tax Advantages of Leasing," Un. Br. No. 335, 5-12 | 2 |
| A. There are no "tax advantages" to leasing | 2 |
| B. There is nothing unique about Hanover's case or its claim for damages | 4 |
| II. Reply to United's arguments as to the retroactive application of the final decree in the government case, Un. Br. No. 335, 12-26 | 9 |
| III. Reply to United's arguments as to Hanover's requests for relief, Un. Br. No. 335, 26-29 | 20 |
| A. As to the ORL machine, Un. Br. No. 335, 27-28 | 20 |
| B. As to attorneys' fees, Un. Br. No. 335, 28 | 21 |
| C. As to "other damage issues," Un. Br. No. 335, 29 | 22 |
| D. As to "Hanover's attempt to avoid retrial," Un. Br. No. 335, 29 | 23 |
| Conclusion | 24 |


## TABLE OF CASES


*Alcoa (United States* v. *Aluminum Co. of America)*, 148 F. 2d 416 (2d Cir. 1945) ..... 12, 14

*American Column & Lumber Co.* v. *United States*, 257 U. S. 377, 419 (1921) ..... 16

*American Tobacco Co.* v. *United States*, 328 U. S. 781 (1946) ..... 9, 10, 14

*Bauer & Cie* v. *O'Donnell*, 229 U. S. 1 ..... 16, 17

*Beggs* v. *Dougherty Overseas, Inc.*, 287 F. 2d 80 (2d Cir. 1961) ..... 6

PAGE

*Hartford-Empire Co.* v. *United States*, 323 U. S. 386 (1945) ..... 14

*Henry* v. *A. B. Dick Co.*, 224 U. S. 1 (1912) ..... 16, 17

*Southern Pacific Co.* v. *Darnell-Taenzer Lumber Co.*, 245 U. S. 531 (1918) ..... 5

*Straus* v. *Victor Talking Machine Co.*, 297 Fed. 791 (2d Cir. 1924) ..... 16, 17

*United Shoe Machinery Corp.* v. *United States*, 258 U. S. 451; and at earlier stages, 234 Fed. 127 (E.D. Mo. 1916), 264 Fed. 138 (E.D. Mo. 1920), *appeal by U. S. dismissed*, 254 U. S. 666 (1921) ..... 14, 15

*United States* v. *Aluminum Co. of America*, 148 F. 2d 416 (2d Cir. 1945) ..... 12, 14

*United States* v. *American Can Co.*, 230 Fed. 859 (D. Md. 1916), 234 Fed. 1019 (D. Md. 1916) *appeal dismissed*, 256 U. S. 706 (1921) ..... 12

*United States* v. *International Harvester Co.*, 274 U. S. 693 (1927) ..... 11, 18

*United States* v. *Keystone Watch Case Co.*, 218 Fed. 502 (E.D. Pa. 1915) ..... 13

*United States* v. *Patten*, 187 Fed. 664 (S.D.N.Y.) ..... 12

*United States* v. *Reading Co.*, 253 U. S. 26 (1920) ..... 18

*United States* v. *Southern Pacific Co.*, 259 U. S. 214 (1922) ..... 18

*United States* v. *Swift & Co.*, 286 U. S. 106 (1932) ..... 11, 18

*United States* v. *Union Pacific R. R.*, 226 U. S. 61 (1912) ..... 18

*United States* v. *United Shoe Machinery Corp.*, 247 U. S. 32 (1918) ..... 14, 15, 19

*United States* v. *United Shoe Machinery Corp.*, 110 F. Supp. 295 (D. Mass. 1953) *aff'd per curiam*, 347 U. S. 521 (1954) ..... 9, 10, 15, 18

*United States* v. *United States Steel Corp.*, 251 U. S. 417 (1920) ..... 11

*United States* v. *Winslow*, 227 U. S. 202 (1913) ..... 14

**STATUTE**

Clayton Act (38 Stat. 731, 15 U. S. C. A. § 15) Section 4 ..... 6

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ON WRIT OF CERTIORARI TO THE COURT OF APPEALS
FOR THE THIRD CIRCUIT

## REPLY BRIEF FOR PETITIONER THE HANOVER SHOE, INC.

The Hanover Shoe, Inc. (hereinafter Hanover), plaintiff below and petitioner herein, submits this reply to the brief dated December 22, 1967 (hereinafter Un. Br. No. 335) submitted by United Shoe Machinery Corporation (hereinafter United), defendant below and respondent herein. The brief for petitioner Hanover filed November 24, 1967 will be referred to hereinafter as Han. Br. No. 335.

## I.

## Reply to United's arguments as to "The Tax Advantages of Leasing," Un. Br. No. 335, 5-12.

### A. There are no "tax advantages" to leasing.

Leasing has no tax advantages over ownership. Under our tax laws, lease payments are fully deductible as rent paid and ownership costs are fully deductible as depreciation, repair and maintenance expense, and interest paid on money borrowed to buy.*

If there are benefits or advantages in ownership as against leasing or leasing as against ownership, they must be found outside our tax laws. That is where Hanover found them when it had the chance.** The Court of Appeals was quite wrong in seemingly supposing that our tax laws favored one over the other.*** United in its brief points

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* These items are the components of ownership cost utilized by the District Court in computing the damage of $1,413,203. *See* A. 81-82, 92; 245 F. Supp. at 287-288, 292. Of course "ownership cost" is quite distinct from "purchase price."

** See Han. Br. No. 335 fn.*, 12-13. Hanover's first chance to buy United's lease-only machines came when the final decree in the Government case became effective on June 1, 1955. Nothing in the record shows that tax considerations played a part in Hanover's decision to buy over $500,000 worth of United machines shortly thereafter.

*** Thus, the Court of Appeals refers to "whatever tax advantages Hanover obtained by the leasing system," (A. 213) 377 F. 2d at 792; to "the benefit of tax deductions for the rental and royalty payments" that it would have lost if it had owned the machinery, *ibid.*, in disregard of the deductions available for an owner; to "the tax advantages it received under the leasing system," *ibid.*; to "the favorable tax consequences which Hanover obtained from leasing and the unfavorable consequences which would have flowed from ownership," (A. 215) 377 F. 2d at 792-793.

The Court of Appeals was also quite wrong in its reference to a capital gains tax on the sale of owned machines at more than depreciated book value, (A. 214-215) 377 F. 2d at 792. All statements about ownership are necessarily hypothetical because Hanover was deprived of the possibility of ownership. Consequently there is no evidence that, if Hanover were an owner, it would have sold any of its machines or sold any at more than depreciated book value.

to nothing to support its claim that our tax law produces benefits for leasing as against ownership. United's pose as a benevolent monopolist showering mysterious tax benefits* upon its captive lessees is a pretentious fabrication.

In Hanover's case, the District Court fixed the dollar amount of Hanover's injury, through being compelled to lease and without regard to tax consequences, at $1,413,203 during the statutory period. This figure is the actual excess payment Hanover would not have had to pay except for United's monopolization. It is the amount United unlawfully took from Hanover. That is Hanover's case.

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* United does no more than reiterate "tax saving" "actual tax benefits" Un. Br. No. 335, 2; the "tax advantages of leasing," *id.* at 5; the "net tax benefits of leasing," *id.* at 8; the "tax advantages of leasing," *id.* at 11.

The example proffered by United, Un. Br. No. 335, 6, apparently to show that tax consequences favor leasing, is obscure and meaningless.

What is the "before-tax purchase cost of $100" that is compared with an "annual before-tax leasing cost of $160?" The lease cost is said to be "annual." The "purchase cost" is not, yet they are compared as though they were. A "purchase" is scarely annual and it is ludicrous to present an example of a machine that rents for $160 a year yet can be purchased for only $100! Over ten years the rent would be $1,600 yet "purchase cost" is said to be $100! As we have shown above, both leasing and ownership costs are 100% deductible. If the "purchase cost" is meant to be not the original purchase price but the annual ownership cost to be compared with the annual lease cost, then, both items—$160 and $100—are deductible each year. Assuming a 50% tax rate, as United does in reducing the "actual leasing cost" from $160 to $80 a year, the annual ownership cost becomes $50, not $90 as United states. [With annual ownership cost of $100 being fully deductible it is inconceivable that Hanover would deduct only $10 each year, as United implies.] It follows, Hanover submits, that since the lease cost of $160 exceeded the ownership cost of $100 by $60, this excess is quite properly the damage figure.

**B. There is nothing unique about Hanover's case or its claim for damages.**

There is nothing unique about Hanover's case, as United seems to claim.* The Court of Appeals did not treat it as unique. United no doubt makes the point to avoid asking this Court to adopt an after-tax rule of damages for general application.

There is nothing unique about calculating damages by comparing ownership costs with leasing costs when what is sought is a determination of the extent of the damage suffered by a victim who wanted to own machinery and was prevented from doing so by the exclusionary practices and policies of a monopolist. Building on the finding that Hanover would have purchased if it could, the Court of Appeals then assumed, as does United's argument, and wholly without support in the record, that availability of a choice must be attributed to Hanover during the damage period. As we pointed out in our main brief, Hanover had no choice, Han. Br. No. 335, 12. Choice, we submit, requires alternatives, each of which may be freely selected. The basis of United's liability is that, as a monopolist, United denied choice.**

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* United tries to limit the holding of the Court of Appeals in United's statements that "It is the unusual nature of the claimed injury and damages * * * which necessitates consideration of all factors, including the effect of Federal and state income tax deductions * * *", Un. Br. No. 335, 9; and, further, "But few if any cases would involve the novel theory of damages urged here * * *," *id.* at 11, fn. 7.

** United makes the wholly erroneous argument that "the asserted basis for United's liability" is that Hanover would have chosen to buy rather than lease the machinery, Un. Br. No. 335, 5. That is not correct. Hanover's "basis" is monopolization in violation of Section 2 of the Sherman Act through, among other matters, United's long-standing exclusionary lease-only policy that injured Hanover.

United, having fabricated a choice, and the Court of Appeals, having apparently assumed the existence of that nonexistent choice, next assume what a business man would do in making the choice.* But here we are not concerned with the variety of factors that a business man might consider when faced with the choice between buying or leasing a factory site, trucks, shoe machinery or anything else. Here the problem is how the businessman's damage is to be computed when a monopolist gives him no choice.

The entire artificial structure of argument based on choice falls to the ground when choice is eliminated as a factor in calculating damage. Choice can have no place in Hanover's case, because:

First, there was in fact no choice and no business reality (other than the denial of the right to purchase), to be considered during the damage period; and

Second, if there had been, there would be no basis for a claim of violation of law and damage. The Court of Appeals; in espousing a fiction of choice, was espousing a self-destructive argument and one that automatically abolished the possibility of damage. Choice, it seems obvious to Hanover, means freedom to choose and thus precludes damage based on monopolization that denied choice.

The basic error of the Court of Appeals is that in a calculation of damages it directed the District Court "to go beyond the first step." *Southern Pacific Co.* v. *Darnell-Taenzer Lumber Co.*, 245 U. S. 531, 533 (1918), Han.

* All of United's citations to business literature, etc. Un. Br. No. 335, 5-6 and to the considerations that were relevant when the final decree became effective in the Government case and shoe manufacturers in fact had a choice, Un. Br. No. 335, 7 are wholly beside the point as far as Hanover's case is concerned.

Br. No. 335, 15-20. By so doing, as we demonstrated in our main brief and also show below, it would reward the wrongdoer and penalize the victim.

United has no answer to the applicable case law on damages in antitrust cases cited by Hanover, Han. Br. No. 335, 15-20* or to Hanover's policy arguments, *id.* at 20-24. It dismisses all with its own question begging *ipse dixit* that damages are not shown until taxes have first been deducted in making the calculation. This kind of argumentation enables United, as we showed in the table in Han. Br. No. 335, 14-15, to retain some $350,000 of the $1,413,203 of excess machinery cost found by the District Court to have been received by it from Hanover, while leaving Hanover still out of pocket $350,000.

Under that approach Hanover will not recover "the damages * * * sustained",** but will be left with a substantial deficit prior to trebling, as shown in the table in Han. Br. No. 335 at 14-15. Apart from a quibble*** and

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* Of the five cases cited by United, Un. Br. No. 335, 9-10, only one relates to the calculation of damages. That was an employment contract case that involved no more than construction of an employment contract, *Beggs* v. *Dougherty Overseas, Inc.*, 287 F. 2d 80 (2d Cir. 1961). The term of employment had been negotiated with a view to assuring the employee of work abroad during the full 18 months necessary to qualify him as exempt from payment of United States income taxes on his first $20,000 of income. When the employee was wrongfully fired and went home, his employer became liable under the contract to indemnify him for the extra United States taxes it had been understood the employee would not have to pay.

The remaining cases cited in United's brief are not cases of damage calculation and have no relevance here.

** Clayton Act, 1914, c. 323, §4, 38 Stat. 731, quoted Han. Br. No. 335, 3.

*** United quarrels about the designation of the first entry as "Excess Rental Charges." The footnote defines this to mean the "excess of rental cost over free market ownership cost before tax." That is what it is and indeed it is what United suggests, Un. Br. No. 335, 10.

two wholly erroneous statements about this table,* United does not meet the main point shown in this table that, if the decision of the Court of Appeals is accepted, United will, after payment of compensatory damages, come out $350,000 ahead and Hanover will be $350,000 out of pocket.

In its answering brief United never meets this central point.

Any rule of damage law that produces this result is obviously inequitable and wrong. The error of the Court of Appeals which causes this result is in considering taxes at all in computing damage.

Damages calculated, as they were by the District Court, without considering the so-called tax advantages of leasing show that, in order to attain a just result, United should pay Hanover the full amount of $1,413,203 that

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* First, Un. Br. No. 335, 11, United erroneously states that Hanover deducted in its Table only the so-called "Excess Rental Charges" and not the whole of the lease charges. The figure of "Excess Rental Charges" is, as stated, the excess of rental cost over free market ownership cost before tax. The damage figure, rounded off, found by the District Court (A. 166) 245 F. Supp. 302, of course, takes into account the full amount of Hanover's lease payments to United, not just part of them, in arriving at Hanover's damage figure. It is absurd to suggest, as United does, Un. Br. No. 335, 10-11, that the tax effect of any amounts other than the excess amounts should be considered in the table.

Second, in footnote 5, Un. Br. No. 335, 11, United attacks the deduction of excess rental charges by distorting the decision of Judge Goodrich in the separate trial of the passing on defense. Both of Hanover's methods of calculating damage are alleged in the complaint, A. 19, i.e. its primary claim, accepted by both courts below, that Hanover was injured in being required to lease and thus deprived of the savings of ownership and its other claim, which it failed to prove, that the lease payments themselves were excessive. Both were before Judge Goodrich. The "second entry" in the table in Han. Br. No. 335, 14, is, of course, the reduction in taxes which follows from the deduction of lease charges. As noted in the preceding paragraph, Hanover would in fact deduct all lease payments, just as it would deduct all of ownership cost. In the table, however, we have stated only the excess of lease cost over ownership cost which determines the damage here.

United unlawfully exacted during the damage period. The dual objective of the law of damages is to restore the victim and the wrongdoer to the same financial position that existed before the wrongful acts. Hanover is entitled to recover each dollar wrongfully taken from it. United must disgorge each dollar so taken. The damage judgment that attains these goals is the just judgment.

The following table shows the just result that is reached under the rule of damages urged by Hanover:

HANOVER—ASSUMING 50% TAX RATE

| | | |
|---|---|---|
| Excess Payments | | $1,400,000 |
| Taxes Hanover saved by deducting such excess | | 700,000 |
| Out of Pocket | | $ 700,000 |
| Recovery in full—the damages | $1,400,000 | |
| Tax on Recovery | 700,000 | |
| Recovery after tax—In Pocket | | 700,000 |
| In or Out of Pocket | | 0 |

UNITED—ASSUMING 50% TAX RATE

| | | |
|---|---|---|
| Excess Payments Received | | $1,400,000 |
| Taxes Paid thereon by United | | 700,000 |
| In Pocket | | $ 700,000 |
| Recovery—Damages Paid | $1,400,000 | |
| Taxes Saved by Deduction of Damage paid | 700,000 | |
| Out of Pocket | | 700,000 |
| In or Out of Pocket | | 0 |

## II.

**Reply to United's arguments as to retroactive application of the final decree in the government case, Un. Br. No. 335, 12-26.**

The issue as to retroactivity presented by United is whether an important item of proof—the final decree in the Government case*—in support of Hanover's claim of monopolization in violation of Section 2 may be received as prima facie proof for the full period of the statute of limitations or whether it may not serve as prima facie proof at all [this is United's first position when it argues that the final decree may be applied only prospectively from the date of the decision, Un. Br. No. 335, 12] or only from June 10, 1946, the date of the decision of this Court in *American Tobacco Co.* v. *United States,* 328 U. S. 781 [this was the view of the Court of Appeals that Hanover claims as error and that United defends as its second position, Un. Br. No. 335, 12-13].

United has pointed to nothing in the language of the final decree itself to support either of its claims. Hanover submits that this should end the matter. If the Court that entered the decree fixed no limits to its effect and operation, past or future, the treble damage court should apply it as its language adjudicates. Judge Sheridan below was correct in looking first to the language of the final decree. He concluded that "Judge Wyzanski did not attempt to limit his decree to the future" (A. 48) 245

* *United States* v. *United Shoe Machinery Corporation,* 110 F. Supp. 295 (D. Mass. 1953) *aff'd per curiam,* 347 U. S. 521 (1954).

F. Supp. at 272.* The Court of Appeals agreed on this point (A. 203-204) 377 F. 2d at 787.

Contrary to United's suggestion, Un. Br. No. 335, 13, Hanover is not in disagreement with the conclusions of Judge Sheridan. Neither does Hanover have any quarrel with the District Court in the Government case. Rather, it relies on that court's decree as prima facie evidence of monopolization. In short, Hanover has no fault to find with any "holding" of either of those courts. We claim error in the decision of the Court of Appeals. United is correct about that.

The fault we find with the decision of the Court of Appeals is that, based on a misreading of the prior decisions involving United and an erroneous view of the applicable law, it holds that Hanover is not entitled to damages prior to the *American Tobacco* decision by this Court. We argue this point in Han. Br. No. 335, 24-41. In this brief we will reply only to erroneous and misleading points in United's answering brief.

Under heading B, Un. Br. No. 335, 13-25, United does not overcome Hanover's argument by quoting selected bits from Judge Wyzanski's opinion in the Government case, Un. Br. No. 335, 13-14. The only way to correct United's statements is to put these excerpts in their proper context.

The statement of the District Court in the Government case that "United's power does not rest on predatory practices" Un. Br. No. 335, 14, was part of the conclusion that it was irrelevant that United's policies were not immoral and that "the violation with which United is now charged depends not on moral considerations, but on solely economic considerations," 110 F. Supp. at 345. Judge Wyzanski had, a few paragraphs ahead of this, held that United's market control rested on "barriers to competition

* Hanover develops this point in its brief in No. 463, 21-23. See also *id.*, 16-21.

* * * erected by United's own business policies," notably "its system of leasing, and not selling its more important machines," *id.* at 344. There is no dispute about any of this.

The next bit quoted by United, Un. Br. No. 335, 14, is that until Alcoa lost its case in 1945, United had "no significant reason to suppose" that it had been violating Section 2. Again, Judge Wyzanski was using this to show that the officers of United had no "moral deficiency." In this context it was his view that trial judges should not proceed with "surgical ruthlessness" in applying the remedy of dissolution, 110 F. Supp. at 348. The bit quoted by United in no way qualifies the adjudication of illegality based on monopolization and exclusionary policies and practices.

Next, United cites the *Steel, Harvester* and *Swift* decisions,* Un. Br. No. 335, 15-17, in its attempt to show that United, which was found not to have engaged in "predatory practices," was, therefore, untouchable under earlier decisions, *id.* at 15-20. United is merely diverting attention from the holding in the Government case of its monopolistic position and its exclusionary lease-only practices when it seeks to put itself apart from earlier antitrust violators.

Hanover does not claim that United's monopolization had been accomplished through the sort of "predatory practices" fashionable in bygone years. It was accomplished in other ways, as was held in the Government case. United's brief reads as though United had won the Government case because the Court in that case found that it had not engaged in "predatory practices." It seems to be

* *United States* v. *United States Steel Corp.*, 251 U. S. 417 (1920); *United States* v. *International Harvester Co.*, 274 U. S. 693 (1927); *United States* v. *Swift & Co.*, 286 U. S. 106 (1932).

worth noting that it lost that case. Hanover's case rests on monopolization by United of 89% to 100% of the twenty shoe machine types used by Hanover, which accounted for 80 percent of the charges Hanover paid United, and of 85% to 100% of all but six of the machine types Hanover leased from United (A. 34-35) 245 F. Supp. at 265-266, and on United's exclusionary lease-only policy and practices.

United cites, Un. Br. No. 335, 17, two lower court decisions in 1915 and 1916 to support its claim that until *Alcoa** in 1945 unlawful or predatory acts were an essential element of monopolization by a single firm. United at this point ignores the decision in 1911 in *United States v. Patten,* 187 Fed. 664 (S.D.N.Y.) cited in Han. Br. No. 335, 29. This Court quoted an excerpt from the opinion in that case with evident approval in *American Tobacco Co.* v. *United States,* 328 U. S. 781 at 811.** Hanover submits that the *Patten* case, which this Court obviously did not consider strange or novel, is far more significant than whatever support United thinks it can find in the two lower court decisions cited by it.

However, it is hard to find any support in *United States* v. *American Can Co.,* 230 Fed. 859 (D. Md. 1916), 234 Fed. 1019 (D. Md. 1916), because there the District Court declared that a decree would be entered "* * *adjudging that while the defendant was organized to monopolize interstate trade in cans, and to attain that object such

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* *United States v. Aluminum Co. of America,* 148 F. 2d 416 (2d Cir.).

** This Court quoted the *Patten* excerpt in support of its statement that, "The authorities support the view that the material consideration in determining whether a monopoly exists is not that prices are raised and that competition actually is excluded but that power exists to raise prices or to exclude competition when it is desired to do so," 328 U. S. 781 at 811.

trade was unlawfully restrained by it * * *" the court would not at that time decree dissolution. This decision was reached "* * * without prejudice to a renewal of such demand * * * if it shall hereafter be made to appear to the court * * * that the size and power of the defendant * * * are being used to the injury of the public, or whenever such size and power * * * have given to the defendant a dominance or control over the industry * * * so great as to make dissolution * * * expedient." 234 Fed. at 1022. The United States was evidently content with this decree and dismissed its appeal, 256 U. S. 706 (1921). The District Court that entered this decree made no mention of any need for a showing of "predatory practices" as an essential element of monopolization, in addition to "size and power." The language quoted above is to the contrary. It is enough if trade is "unlawfully restrained." The exclusionary lease-only practices of United, together with its size, were the basis of the monpolization found in the Government case. United can scarcely be heard to claim that its exclusionary practices were lawful.

The other lower court decision relied on by United, *United States* v. *Keystone Watch Case Co.*, 218 Fed. 502 (E.D. Pa. 1915) is another case in which the District Court, in issuing an injunction directed against antitrust violations, retained jurisdiction with leave to the United States to ask for additional relief "* * * even to the point of breaking up the defendant corporation," *id.* at 519. Again, the United States was understandably content and dismissed its appeal, 257 U. S. 664 (1921). United's brief quotation, Un. Br. No. 335, 17, from the 1915 opinion of the District Court is incomplete but we see no relevance in the elaboration of the views of that District Court, though it should be noted that its recital of modes of violation

is ample enough to include United's exclusionary practices, and that the court left room for later consideration of "other methods of unreasonably restraining trade" that might be developed "* * * in the complexity of human affairs," *id.* at 518.

It took no signal from commentators on *Alcoa,* Un. Br. No. 335, 17-19, to put any company in United's position on full notice of the law on the statute books and of its interpretation by the courts long before *Alcoa* and *American Tobacco,* see Han. Br. No. 335, 27-31.

United next asserts that it had an "assured record of judicial approval" of its leasing policy, Un. Br. No. 335, 20.

In support it first quotes, Un. Br. No. 335, 20-22, bits from the sixty-five pages of opinions of the three judges of the Massachusetts District Court in the civil action brought contemporaneously with the criminal indictment whose dismissal was affirmed in *United States* v. *Winslow,* 227 U. S. 202 (1913). This court on the appeal of the civil case upheld the validity of the clauses in the leases as exercises of United's position as holder of patents covering the machinery, 247 U. S. 32, 56-65 (1918).* The encomiums of the District Court judges on United's leases over fifty years ago have no importance to any issue before this Court in Hanover's case.

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* "To the attacks of the Government the defendants reply that the leases are the exercise of their right as patentees and if there is monopoly in them it is the monopoly of the right," 247 U. S. at 56. Again in 1922 this Court reiterated its view that the 1918 case merely sustained the leases "as valid and binding agreements within the rights of holders of patents." *United Shoe Mach. Corp.* v. *United States,* 258 U. S. 451, 460. And this Court reaffirmed that view of the case in *Hartford-Empire Co.* v. *United States,* 323 U. S. 386, 412 and n. 10 (1945).

In spite of these encomiums, so fulsomely quoted, United makes the limited claim that only the full-capacity clause in its leases was approved, Un. Br. No. 335, 22, in that litigation. United must know, as stated in Han. Br. No. 335, 4, that all clauses under attack were sustained as exercises of United's power as holder of patents on the machinery, 247 U. S. 32, 56-65. This was United's contention, 247 U. S. 32, 56.

Again, concentrating only on the full-capacity clause, United states that this clause survived scrutiny when the United States later proceeded against United's leases under the newly enacted Clayton Act, Un. Br. No. 335, 22-23. This survival, however, was only in the District Court and only on scrutiny of the clause as such and without regard to the manner in which it had been exercised.* This is the only comfort United can find in this, its third encounter with the United States, because the United States prevailed with respect to all other clauses under attack and an injunction issued, 258 U. S. 451 (1922). And even the full capacity clause was stricken in the Government case when proof showed how it had been exercised.**

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* The issue of the validity of this and other restrictive clauses in United's leases was first presented on motion to dismiss the Government's complaint under the Clayton Act. The motion was denied, *United States* v. *United Shoe Machinery Corp.*, 234 Fed. 127 (E.D. Mo. 1916). United quotes, Un. Br. No. 335, 22-23, the opinion of the District Court dealing with the full capacity clause and the excess machinery clause, 234 Fed. at 151 and see also exhibits 2 and 7, *id.* at 131, 132. After trial the District Court enjoined use of eight clauses but again sustained the validity of the full capacity clause, *United States* v. *United Shoe Machinery Corp.*, 264 Fed. 138 (E.D. Mo. 1920) in reliance on its prior opinion on the motion to dismiss, 264 Fed. at 167. The United States dismissed its appeal from this part of the decision of the District Court, 254 U. S. 666 (1921). Defendant United appealed from the decision invalidating eight other clauses in its leases and this Court affirmed in 258 U. S. 451 (1922).

** *United States* v. *United Shoe Machinery Corp.*, 110 F. Supp. 295, 320-321 and Final Decree pars. 4 and 6e, *id.* at 352.

United draws the fantastic conclusion from its recital as to the survival of its full capacity clause before the District Court in 1920 that this gave to it assurance of compliance with the law as to its "current leasing practices," Un. Br. No. 335, 23. Such a conclusion is absurd.

Next, United seeks support in the brief reference to United at the end of the dissenting opinion of Mr. Justice Brandeis in *American Column & Lumber Co.*, v. *United States,* 257 U. S. 377, 419 (1921), Un. Br. No. 335, 23. Mr. Justice Brandeis there pointed to United Shoe Machinery Corporation and United States Steel Corporation as examples of "the inviting field of consolidation" by way of warning that the decision of the Court might lead the independent hardwood lumber companies involved to that device with, as he stated, the result of creating "another huge trust," 257 U. S. at 419.

United next, Un. Br. No. 335, 24, criticizes Hanover's citation of *Straus* v. *Victor Talking Machine Co.,* 297 Fed. 791 (2d Cir. 1924) for the point that evidence of reliance on decisions of this Court is of no avail in a treble damage action. In that case we pointed out that defendant *Victor* had patterned a new marketing plan upon the decision of this Court in *Bauer & Cie* v. *O'Donnell,* 229 U. S. 1 (1913) and had put this forward as a defense when the plan was attacked in a treble damage action. United asserts that *Bauer & Cie* v. *O'Donnell* "did not approve the program for control by the patentee of resale prices of the article patented," Un. Br. No. 335, 24. Of course, it did not, but *Victor* nonetheless relied upon that decision as well as on *Henry* v. *A. B. Dick Co.,* 224 U. S. 1 (1912). This reliance

was explicit.* In fact, *Victor* pleaded as a separate defense its reliance on the *Dick* case, later overruled, as support for the new distributing plan and, in words reminiscent of United's plea here, urged that it would be "most unjust * * * to hold this defendant guilty of wrongful and inequitable conduct when, in fact, its conduct was in accordance with the law of the land, and would cause this defendant great and irreparable damage * * * and that subsequent decisions cannot retroactively make unlawful acts and conduct theretofore lawful under the law of the land."** This plea, as we stated, was to no avail. It had no legal significance.

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* See Plaintiff's Exhibit 6, announcement dated August 1, 1913 from Victor to dealers, R. Vol. IX, pp. 4749-51 in *Straus* v. *Victor Talking Machine Co.*, 297 Fed. 791 (2d Cir. 1924), reading in part as follows:

> "To Victor Dealers:—
>
> Since the decision of the Supreme Court of the United States in the Henry-Dick case, otherwise known as the Mimeograph case, it became apparent to the Victor Co. that a more advantageous system of putting out its goods could be adopted as to certain features, than that theretofore employed by it in selling its goods to the Trade, and to the public. We had been working on this new plan in a somewhat leisurely fashion until the decision of the Supreme Court in the recent Sanatogen case (Bauer Chemical Co. *vs.* O'Donnell) and since this latter decision we have determined to adopt now our new system of licensing our patented goods for use only." *See also* 297 Fed. 791, 794.

In an earlier action brought by Victor against Straus for patent infringement prior to Straus's treble damage action, Victor advanced the identical argument, claiming that its marketing plan was based on *Bauer & Cie* v. *O'Donnell,* but this Court gave short shrift to it:

> "It would be a perversion of terms to call the transaction intended to be embodied in this system of marketing plaintiff's machines a 'license to use the invention.' *Bauer & Cie* v. *O'Donnell,* 229 U. S. 1, 16." *Straus* v. *Victor Talking Machine Co.,* 243 U. S. 490, 501 (1917).

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** Order dated January 17, 1921 and Second Amended Answer of Defendant Victor Talking Machine Co. R. Vol. I, pp. 277-281, in *Straus* v. *Victor Talking Machine Co.* 297 Fed. 791 (2d Cir. 1924).

Finally, United is critical, Un. Br. No. 335, 24-25, of Hanover's reference to Judge Hand's citation in *Alcoa* of four decisions of this Court.* United correctly states that all four were cases of combinations. But Judge Hand did not find this distinction relevant. For purposes of defining the offense of monopolization, Judge Hand was convinced in 1945, on the basis of the law as he knew it, that "it can make no difference whether an existing competition is put an end to, or whether prospective competition is prevented," 148 F. 2d 416, 429. That is Judge Hand's reasoning and it is applicable here.

The Government case here is an exact duplicate of *Alcoa* on this point. In the Government case, as in *Alcoa*, the monopolization rests on exclusionary practices. Here it is the lease-only policy and practices. In *Alcoa* the recital of events is different but the effect was the same, 148 F. 2d 416, 430-431. These are the "abuses" in both cases. These are in the category of the "abuses" that Justice Cardozo referred to in *United States* v. *Swift & Co.*, 286 U. S. 106, 116 (1932), quoted in Han. Br. No. 335, 30. This is no "play on words" as United argues, Un. Br. No. 335, 24. This is the stuff out of which antitrust cases are made. United's exclusionary lease-only policy and practices were found to have been violative of Section 2 of the Sherman Act. There can be no doubt about that. They are no less illegal though the leaders of United who carried on the monopolization for so many years had no "moral deficiency."** Their acts were illegal and that is enough for Hanover's case.

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* *United States* v. *Union Pacific R.R.*, 226 U. S. 61 (1912); *United States* v. *International Harvester Co.*, 274 U. S. 693 (1927); *United States* v. *Reading Co.*, 253 U. S. 26 (1920); *United States* v. *Southern Pacific Co.*, 259 U. S. 214 (1922).

** *United States* v. *United Shoe Machinery Corp.*, 110 F. Supp. 295, 348.

Under heading C, Un. Br. No. 335, 25-26, United persists in making extravagant and incorrect statements about the decisions of this Court.

Heading C itself refers to "The 1918 case* in which this Court upheld United's lease-only policy * * *" No such issue was before this Court in that case. In the text, Un. Br. No. 335, 25, the statement is the same, that this Court "* * * upheld United's lease-only policy." The emphasis is a little different when the reference is to "* * * this Court's holding that its lease-only policy was permissible," Un. Br. No. 335, 26. Again, no such issue was before this Court.

United quarrels with our statement of the basis of the decision of this Court in the 1918 case, Un. Br. No. 335, 25. Hanover's position is stated in Han. Br. No. 335, 34, where we point out our reliance upon the statement of this Court in the 1922 decision as to the basis of the decision in the 1918 case. United's contention before this Court in the 1918 case rested on its patent position. This Court stated: "To the attacks of the Government the defendants reply that the leases are the exercise of their right as patentees and if there is monopoly in them it is the monopoly of the right," 247 U. S. at 56. That is what United contended then. This Court correctly described the decision as resting on that basis. See Han. Br. No. 335, at 33-37 and Han. Br. No. 463, at 37-39.

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* *United States* v. *United Shoe Machinery Corporation*, 247 U. S. 32 (1918).

## III.

**Reply to United's arguments as to Hanover's requests for relief, Un. Br. No. 335, 26-29.**

United is in error in stating in heading 3, Un. Br. No. 335, 26, that Hanover's requests for relief, Han. Br. No. 335, 41-42, attempted to raise issues not properly before this Court.

### A. As to the ORL machine, Un. Br. No. 335, 27-28.

Hanover presents no issue as to this machine that calls for a decision of this Court. Hanover asks only that the mandate of the Court of Appeals be carried out as to an issue that is not before this Court on either Hanover's petition in No. 335 or United's petition in No. 463.

The situation is that Hanover had cross-appealed to the Court of Appeals from so much of the judgment of the District Court as had disallowed damages as to one United machine, the so-called ORL. The Court of Appeals in its decision (A. 215-216) 377 F. 2d 776, 793, declined to pass on Hanover's claim on the record before it and stated that since its decision required a remand for retrial on the damage issue due to the shortened damage period and deduction of taxes, "The issue [as to the ORL] therefore must be remitted to the court below for reconsideration as part of the retrial on damages. When evidence has been taken on this question on retrial the record may well be different from what is now before us." (A. 216) 377 F. 2d 776, 793.

Hanover asks that the mandate of the Court of Appeals be carried out in so far as it relates to Hanover's cross-

appeal below (A. 226).* It is hard for us to understand why it makes any difference whether the hearing before the District Court is "part of the retrial of damages" or not. If Hanover prevails before this Court in No. 335, there will be no need for a retrial of damages but there will still be a need, under the mandate of the Court of Appeals, for a reconsideration by the District Court of the ORL matter. Hanover asks that this mandate be carried out. There must in any event be a recalculation of damages by the District Court because of the shortening of the damage period from September 21, 1955 to June 1, 1955, Han. Br. No. 335, p. 6, fn.; see request No. 2(b), *infra* at 24.

United quarrels, Un. Br. No. 335, 27-28, with a claimed inconsistency between Hanover's request No. 2, Han. Br. No. 335, 41, that the Court of Appeals be directed to affirm the judgment of the District Court and request No. 3, *id.* at 42, that the amended judgment of the Court of Appeals be affirmed in so far as it ordered reconsideration of the ORL point on Hanover's cross-appeal, No. 15,627 before the Court of Appeals. If Hanover's requests present any problem, Hanover asks that request No. 2 be subject to its request No. 3, Han. Br. 41-42.

**B. As to attorneys' fees, Un. Br. No. 335, 28.**

United claims that Hanover in its request No. 1(b), Han. Br. No. 335, 41, is attempting to deprive the Court of Appeals of the opportunity to pass on the reasonableness of the awards. This is not so. The District Court's

* The amended judgment of the Court of Appeals on this point is that, "in Hanover's appeal (No. 15,627) the judgment of the District Court, filed August 13, 1965, be, and the same is hereby vacated so that the issue therein raised may be reconsidered as part of the retrial of damages." (A. 226)

allowance was attacked by United before the Court of Appeals, the issue was briefed and argued before that Court and in its decision that Court found no fault with the District Court's allowances and vacated the awards only for reconsideration in view of the need it felt for a retrial as to damages. If Hanover prevails before this Court, there will be no need for a retrial of damages and, therefore, no need for further proceedings as to the allowance of attorneys' fees. There will only be need for a recalculation of damages to eliminate the last three months and twenty-one days, see *infra* at 23-24.

Hanover has presented no issue to this Court on this point and neither has United. The District Court went into this matter with meticulous care (A. 166-173) 245 F. Supp. 258, 302-305. The action of the Court of Appeals was to note that one item entering into the consideration of this matter by the District Court was "the percentage of the recovery in its original and trebled amounts" (A. 217) 377 F. 2d at 793, and that there might be "a new award" following retrial on damages. Apart from this one point, the Court of Appeals found no fault with the award of the District Court.

United is asking for a third round of briefs and argument as to attorneys' fees. The matter has already been briefed and argued once before the District Court and once before the Court of Appeals. United failed in its first attempt to persuade the Court of Appeals that it should upset the District Court. There is no reason why it should have another chance in the same court.

**C. As to "Other Damage Issues," Un. Br. No. 335, 29.**

In this curious paragraph United argues that Hanover's request that the judgment of the District Court be

affirmed would deprive the Court of Appeals of the opportunity to resolve "other damage issues" raised by United. This supposes that there were questions left open by the Court of Appeals, other than the two on which a remand was ordered.* There are none. United misconstrues what the Court of Appeals said when it argues that the Court of Appeals found it not possible to adjudicate "• • • on the present record," Un. Br. No. 335, 29, important questions raised by United as to Hanover's damage calculations. This is simply not so.**

United has had its day in Court on Hanover's theory of damage and it lost in both courts below. It has presented only one issue before this Court in No. 463 with respect to "the validity of Hanover's damage calculations" Un. Br. No. 335, 29, and that is the item of "cost of capital." That is the only item in Hanover's damage calculations and in its theory of damage that United attacks. Both courts below held against United.

**D. As to "Hanover's attempt to avoid retrial," Un. Br. No. 335, 29.**

In a final paragraph United calls attention to the fact that the Court of Appeals disallowed damages to Hanover for the period of June 1, 1955 to September 21, 1955 (A. 212) 377 F. 2d at 791 and that, therefore, Hanover is in error in its request for relief that the judgment of the

* These, of course, are the two questions presented in No. 335.

** The paragraph in which these quoted words occur shows that the Court of Appeals said precisely the opposite:

> "A number of problems in the proof of damages which have been presented to us will recur on retrial. To the extent that it is possible to adjudicate them on the present record, it is desirable that we do so as a guide to the court below on the retrial," (A. 212) 377 F. 2d at 791.

The Court then proceeded to dispose of them, (A. 212-215) 377 F. 2d at 791-793.

District Court be affirmed, relief par. 2, Han. Br. No. 335, 41. In preparing its petition to this Court Hanover determined not to present this trifling point. In fact, the elimination of the last three months and twenty-one days from the damage calculations presents no need for "a second trial of the damage issue" as United argues, Un. Br. No. 335, 29. The need is only to eliminate these days from the total. Hanover now revises its prayer for relief to take account of this point.

## Conclusion

Hanover's request for relief, Han. Br. No. 335, 41-42, and also Han. Br. No. 463, 62-63, are modified so that:

Request No. 2 is modified to read as follows:

2. The Court of Appeals be directed to affirm the judgment of the District Court dated August 13, 1965 subject only to

a. the reconsideration by the District Court of the disallowance of damages by the District Court as to United's ORL machine; and

b. the elimination from the damage calculations of the period between June 1, 1955 and September 21, 1955.

Respectfully submitted,

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Dated: February 26, 1968

SUPREME COURT U. S.

AUG 7 196

JOHN F. DAVIS, CL

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1967

No. 463

UNITED SHOE MACHINERY CORPORATION,
*Petitioner,*

*v.*

THE HANOVER SHOE, INC.,
*Respondent.*

## CROSS-PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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# INDEX


| | PAGE |
|---|---|
| Opinions Below | 1 |
| Jurisdiction | 2 |
| Questions Presented | 2 |
| Pertinent Statutes | 4 |
| Statement of the Case | 4 |
| Reasons for Granting the Writ | 8 |
| 1. Lease-Only Was Not Adjudged a Violation | 8 |
| 2. The Government Decree Is Not Retroactive | 10 |
| 3. The Decree-Interpretation Question Should Have Been Certified to the Court Which Entered the Decree | 12 |
| 4. The Legality and Reasonableness of the Leases Preclude Recovery | 17 |
| 5. Reflection of Cost of Capital Would Demonstrate the Absence of Damage | 18 |
| 6. Any Excess of Cost of Leasing Over Cost of Ownership Was Not Absorbed by Hanover | 19 |
| 7. Hanover's Failure to Demand Purchases of Machines Indicates Absence of Injury and Precludes Recovery | 20 |
| 8. Recovery is Barred by Limitations | 22 |
| Conclusion | 24 |

## TABLE OF CASES


| | PAGE |
|---|---|
| *American Tobacco Co.* v. *United States*, 328 US 781 | 7, 11, 22 |
| *Bruce's Juices, Inc.* v. *American Can Co.*, 330 US 743 | 18 |
| *Clark Oil Co.* v. *Phillips Petroleum Co.*, 148 F. 2d 580 (CA 8 1945), cert. denied 326 US 734 | 20 |
| *Continental Ore Co.* v. *Union Carbide and Carbon Co.*, 270 US 690 | 21 |
| *Emich Motors Corp.* v. *General Motors Corp.*, 340 US 558 | 9-10 |
| *Farbenfabriken Bayer, A. G.* v. *Sterling Drug, Inc.*, 153 F. Supp. 589 (D. N. J. 1957), aff'd on other grounds 307 F. 2d 210 (CA 3 1962) | 23 |
| *Freedman* v. *Philadelphia Terminals Auction Co.*, 301 F. 2d 830 (CA 3 1962), cert. denied 371 US 829 | 20 |
| *608 Hamilton Street Corp.* v. *Columbia Pictures Corp.*, 244 F. Supp. 193 (ED Pa. 1965) | 21 |
| *J. J. Theatres, Inc.* v. *Twentieth Century-Fox Film Corp.*, 212 F. 2d 840 (CA 2 1954) | 21 |
| *Laitram Corp.* v. *King Crab, Inc.*, 244 F. Supp. 9 (D. Alaska 1965) | 14 |
| *Lawlor* v. *National Screen Service Corp.*, 270 F. 2d 146 (CA 3 1959), cert. denied 362 US 922 | 21 |
| *Leonard* v. *Socony-Vacuum Oil Co.*, 42 F. Supp. 369 (WD Wis.), appeal dismissed on other grounds 130 F. 2d 535 (CA 7 1942) | 20 |
| *Milwaukee Town Corp.* v. *Loew's, Inc.*, 190 F. 2d 561 (CA 7 1951), cert. denied 342 US 909 | 21 |
| *Northwestern Oil Co.* v. *Socony-Vacuum Oil Co.*, 138 F. 2d 967 (CA 7 1943), cert. denied 321 US 792 | 20 |
| *Partmar Corp.* v. *Paramount Pictures Theatres Corp.*, 347 US 89 | 9 |

PAGE

*Royster Drive-In Theatres* v. *American Broadcasting-Paramount Theatres*, 268 F. 2d 246 (CA 2 1959), cert. denied 361 US 885 ..... 21

*Sherman* v. *Goerlicks Inc.*, 238 F. Supp. 728 (ED Mich. 1963), aff'd per curiam 341 F. 2d 988 (CA 6 1965), cert. denied 382 US 830 ..... 23

*Turner Glass Corp.* v. *Hartford-Empire Co.*, 173 F. 2d 49 (CA 7 1949), cert. denied 338 US 839, rehearing denied 338 US 881 ..... 18

*Twin Ports Oil Co.* v. *Pure Oil Co.*, 119 F. 2d 747 (CA 8 1941), cert. denied 314 US 644 ..... 20

*United Shoe Machinery Corp.* v. *United States*, 258 US 451 ..... 10

*United States* v. *United Shoe Machinery Corp.*, 110 F. Supp. 295 (D. Mass. 1953), aff'd 347 US 527 ... 4-7, 8, 9, 10, 11, 12-13, 15-17, 19

*United States* v. *United Shoe Machinery Company of N. J.*, 247 US 32 ..... 10

*United States* v. *Winslow*, 227 US 202 ..... 10

*United States Gypsum Co.* v. *National Gypsum Co.*, 352 US 457 ..... 12, 15

*W. B. Coon Co.* v. *United Shoe Machinery Corp.*, Civil No. 6841 (WD N. Y. 1963) ..... 13–14

*Webster Rosewood Corp.* v. *Schine Chain Theatres, Inc.*, 263 F. 2d 533 (CA 2 1959); cert. denied 360 US 912 ..... 21

---

**STATUTES AND OTHER AUTHORITIES**

---

Clayton Act § 4, 15 USC § 15 ..... 2, 3, 4, 20

Clayton Act § 5(a) 15 USC § 16a ..... 2, 4, 6, 8

Pollack, *Standing to Sue, Remoteness of Injury and the Passing-On Doctrine*, 32 A. B. A. Antitrust Law Journal (1966) ..... 20

Sherman Act § 2, 15 USC § 2 ..... 4

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1967

No.

UNITED SHOE MACHINERY CORPORATION,
*Petitioner,*

*v.*

THE HANOVER SHOE, INC.,
*Respondent.*

## CROSS-PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

United Shoe Machinery Corporation (herein "United"), defendant below, prays for issuance of a writ of certiorari to review the judgments of the Court of Appeals for the Third Circuit entered April 11 and May 18 (on rehearing) 1967. Respondent The Hanover Shoe, Inc. (herein "Hanover"), plaintiff below, has petitioned in No. 335 for issuance of a writ of certiorari with respect to the same judgments of the Court of Appeals and United has opposed that petition. This petition of United is in the nature of a cross-petition, the writ here sought to issue only in the event this Court shall grant Hanover's petition in No. 335.

### Opinions Below

The opinions of the Court of Appeals, dated April 11 and May 18 1967 are not yet officially reported. They are attached as Appendix A to Hanover's petition in No. 335. The opinion of the District Court for the Middle District

of Pennsylvania is reported in 245 F. Supp. 258. The opinion of the District Court on the trial of a preliminary issue under Federal Rule 42(b) is reported in 185 F. Supp. 826, that of the Court of Appeals in 281 F. 2d 481, and the denial of certiorari on that issue in 364 US 901.

## Jurisdiction

The judgment of the Court of Appeals affirming in part and reversing in part the District Court and directing a second trial was entered April 11 1967 and the judgment denying petitions by both parties for rehearing was entered May 18 1967. Jurisdiction is invoked under 28 USC § 1254(1).

## Questions Presented

In a private antitrust suit under Clayton Act § 4 claiming damages (to be trebled) from injury assertedly caused by defendant's monopolization and relying on the prior decree in a Government suit pursuant to Clayton Act § 5(a)—

1. May the trial court determine that an antitrust violation had been adjudicated solely by traveling outside the Government decree and erroneously interpreting the copious supporting findings of the Government antitrust court where the Government decree on its face dismissed with prejudice the allegation of such antitrust violation?

2. Where the judgment in the Government antitrust case represented a departure from the established prior course of decision as respects defendant's machinery leasing system and determined monopolization in 1953 by reason of an intervening change in decisional law, should the 1953 judgment reflecting such change of the law be given retroactive effect for the purposes of a private damage claim for a period commencing in 1946?

3. If the proper scope and the extent of retroactivity of the underlying Government antitrust decree are in question and are decisive of the claims in a private antitrust suit based thereon, should not the trial court upon the request of defendant have certified such points to the Government antitrust court for guidance by it and to avoid confusion and conflict after the Government antitrust court had clearly indicated that such confusion and conflict existed?

4. Where the parties had dealt solely upon the basis of leases lawful in form and reasonable in their terms, does plaintiff-lessee have a cause of action for damages expressed in terms of an allegedly cheaper purchase price because of inability to purchase the same machinery from defendant?

5. Where plaintiff shoe manufacturer's claimed damages are based on a comparison of a putative cost of purchasing defendant's shoe machines with the cost of leasing them, should not the putative cost of purchasing take into account the cost of capital to plaintiff?

6. Does a lessee of shoe machinery sustain injury within the meaning of Clayton Act § 4 from a monopolization by defendant of the shoe machinery market under circumstances in which such lessee's entire cost of using such machinery is incorporated by it in its sales prices to the public and absorbed in regularly increased profits?

7. Where plaintiff shoe manufacturer and defendant shoe machinery manufacturer had over a period of more than 50 years dealt on a lease basis without protest on plaintiff's part and on terms identical to those enjoyed by plantiff's competitors and defendant's other customers, does a cause of action arise for plaintiff's inability to purchase from defendant the same machines in the absence of a prior demand by plaintiff to purchase?

8. Upon the assumption of a violation of the antitrust laws by virtue of defendant shoe machinery manufacturer's failure to offer for sale its machinery which was acquired by plaintiff shoe manufacturer on a lease basis only, does not the cause of action under Clayton Act § 4 accrue upon the first impact of the lease-only policy upon a plaintiff's business (in 1912 or earlier) with the result that the statutory bar was complete before the filing of suit in 1955?

## Pertinent Statutes

The statutes pertinent to the questions presented are Sherman Act § 2, 15 USC § 2, and Clayton §§ 4 and 5 (a), 15 USC §§ 15 and 16(a), printed in Appendix C to Hanover's petition in No. 335.

## Statement of the Case

The action is one for treble damages under the antitrust laws and was filed September 21 1955 by Hanover, which since at least as early as 1912 has been a shoe manufacturer and lessee of shoe machinery manufactured by United. Hanover based its case (728a-29a)* on a decree entered by the United States District Court for Massachusetts (Wyzanski, J.) in 1953 in a Government antitrust action against United. *United States* v. *United Shoe Machinery Corp.*, 110 F. Supp. 295, aff'd per curiam 347 US 527. The complaint herein charges United with monopolization of the shoe machinery industry since 1912 and claims dam-

*These references are to pages of United's appendix in the Court of Appeals, filed in this Court together with Hanover's petition in No. 335, which pursuant to the Court's Rule 21(5) also constitutes the record on the cross-petition herein.

ages by virtue of alleged excessive lease charges to Hanover and its inability to acquire shoe machinery by purchase (19a).

The 1953 decree found as "means whereby defendant monopolized the shoe machinery market" particular types of leases which included a ten-year term, a full-capacity clause, or deferred payment charges, and leases under which United rendered repair and other service without separate charge (110 F. Supp. at 352).

Leasing as such was not condemned by the decree—only certain lease clauses and practices (*ibid.*). Nor were future leases proscribed provided that they omitted the monopolizing provisions and provided that the same machines offered in the future for lease were likewise offered for sale. (*ibid.*) The only "means" of monopolization set forth in the decree were leases in the particular form thereafter expressly outlawed. Thus, the decree did not adjudicate that United's asserted refusal to sell its machines violated the Sherman Act.

In conformity with the decree itself, Judge Wyzanski in his opinion adverted to the historical tradition of leasing in the shoe machinery industry, the absence of expressed dissatisfaction from consumers respecting that system, the ease of entry into shoe manufacture, the uniformity of United's lease rates, the excellent performance of United's machines, and its prompt and efficient repair and other services (110 F. Supp. at 340). Judge Wyzanski found that the particular type of lease theretofore used by United deterred a shoe manufacturer from obtaining a competitor's machine "more than if he owned that same United machine, *or if he held it on a short lease* carrying simple rental provisions and a reasonable cancellation before the end of the term" (*ibid.*) (emphasis added). It was the particular form of "long-term, complicated leases" (*id.* at

343) with the indicated "exclusionary features" (*id.* at 344) that were condemned, and leases as such were not abolished (*id.* at 349). There were no "predatory practices", "few monopolies could produce a record so free from any taint of that kind of wrong-doing" (*id.* at 345), and virtually all shoe manufacturers who testified preferred the leasing system (*id.* at 349). In light of three earlier decisions of this Court which specifically involved United and which left its activities "uncondemned" and "in part endorsed", "it would be anomalous to charge the officers of United with any moral deficiency" (*id.* at 348).

In requiring that machines *in the future* be offered for sale as well as for lease, Judge Wyzanski specifically stated that the principal merit of that proposal was not "in widening the choices" of customers, since "it may be assumed that the antitrust laws are not designed, chiefly, if at all, to give a customer choice as to the selling methods by which his supplier offers that supplier's own products" (*id.* at 349-50). Rather, the merit was in the future creation of a second-hand market as further competition in order to erode the market power of United maintained by the exclusionary features of the leases (*ibid.*).

On the basis of that decree the District Court herein rejected Hanover's primary claim that the leasing charges were excessive because the Government decree, "on which Hanover relied, had made no finding that United's leasing charges were excessive" (Pet. 5a).* But the District Court held that the Wyzanski decree and decision were prima facie evidence under Clayton Act § 5(a) that United had in the past violated the antitrust laws by not offering its machines for sale, since the court observed that Judge Wyzanski had found the particular leases in question to be

*Such references are to pages of Appendix A to Hanover's petition in No. 335.

"means" of monopolization and had decreed that in the future the machines should be offered for sale as well (752a). The District Court concluded that Hanover "would have purchased" the more important machines (774a).

The District Court entered judgment for Hanover in the amount of $4,239,609 with interest, and for $650,000 attorneys' fees in addition (873a). The basis of this decision was that the difference between the aggregate lease charges for the machines in question during the damage period—albeit reasonable as lease charges—and the price for which the court calculated Hanover could have bought the machines if they had been offered for sale was $1,482,462 (859a), which amount less interest was trebled in the judgment.

On appeals by both parties the Court of Appeals vacated the judgment and directed a new trial. The court agreed in part with United's claim that the decree adverse to it in the Government antitrust suit should not be retroactively applied by holding that United was justified in its business practices with respect to the leasing of shoe machinery up to the date in 1946 when this Court approved Judge Learned Hand's holding in the *Alcoa* case (*American Tobacco Co.* v. *United States,* 328 US 781, 811-15). The court confined damages to the period commencing at that time and held that the damage period should end not at the date of filing of the complaint, but on June 1 1955 when conversion from leasehold to ownership of the United machines first became possible as an alternative by reason of Judge Wyzanski's approval of the appropriate plan under the decree.

The Court of Appeals also reversed the District Court for its failure to take into account the tax advantages of leasing for the purpose of comparing ownership cost with lease cost. On Hanover's appeal from the exclusion of one of United's machines from the damage calculation by virtue

of the availability of a comparable outside machine, the Court of Appeals remitted this item for reconsideration by the District Court in view of the changes directed to be made in the damage period.

## Reasons for Granting the Writ

### 1. Lease-Only Was Not Adjudged a Violation.

The courts below went beyond the permitted limits of the statutory estoppel created by Clayton Act § 5(a), 15 USC § 16(a), which confines the effect of a Government antitrust action to the judgment or decree itself in the following words:

> "A final judgment or decree . . . shall be prima facie evidence . . . as to all matters respecting which said judgment or decree would be an estoppel as between the parties thereto. . . ."

Judge Wyzanski's decree in 110 F. Supp. at 352 did not find an antitrust violation in respect of United's failure to sell shoe machines in the preceding period, whereas the predicate erroneously employed by the courts below was that the decree did so find. Judge Wyzanski set forth the violations in paragraph 4 of the decree (*ibid.*) not in terms of failure to sell or in terms of leases as such but only leases including (a) a ten-year term, (b) a full-capacity clause, (c) deferred payment charges, or (d) the rendition of repair and other services without separate charge. Nothing else was embraced in the decree as a violation of law. To the contrary, paragraph 2 declared in part (*ibid.*):

> "The other charges of violation of the Sherman Act set forth in the complaint are dismissed with prejudice."

These other charges include the specific charge of refusal to sell machines which the courts below erroneously determined to have been adjudicated a violation. That is to say, one of the paragraphs of the Government complaint dismissed with prejudice by Judge Wyzanski in paragraph 2 of his decree was paragraph 61 listed in the complaint under "Offenses Charged":

> "61. For many years United has declined to sell most of its shoe machines and has made such machines available to shoe manufacturers only upon leases. . . ." (Pet. 13a)

The Court of Appeals seemed to recognize the force of this argument. It said (Pet. 13a):

> "The [Government] decree does not contain any comparable declaration regarding United's failure to make shoe machinery available for sale. . . . On the face of the decree, therefore, United's contention is not lacking in merit."

The extension by the courts below of the estoppel created by Congress exceeded the courts' power and resulted in an injustice to United made particularly severe by the Draconian sanction of treble damages. The decision below conflicts with the very cases recognized by the District Court (749a) as controlling on the scope of the statutory estoppel. *Partmar Corp.* v. *Paramount Pictures Theatres Corp.*, 347 US 89, 102; *Emich Motors Corp.* v. *General Motors Corp.*, 340 US 558, 569. The Court of Appeals misinterpreted the applicability of the *Emich* decision to the Wyzanski decree (Pet. 14a). The general jury verdict in *Emich* necessitated going beyond the verdict itself to determine the components of the violation. The Court in *Emich* therefore endorsed an inquiry into matters of fact and law "necessarily decided by the conviction and the verdict".

(*Ibid.*) By contrast to a general jury verdict there was no need with respect to the equity decree here involved to go beyond the decree to determine what was "necessarily decided". The components of the violation are set forth in the decree itself.

**2. The Government Decree Is Not Retroactive**

Having mistakenly attributed to Judge Wyzanski a finding that United's failure to sell was an antitrust violation, the courts below then further read retroactive condemnation into Judge Wyzanski's decision—erroneously, in our submission.

To the trial of the Government case which underlies the action at bar United came vested with three decisions of this Court in its favor. Judge Wyzanski recognized this (110 F. Supp. at 348):

> "The Supreme Court had three times, in *United States* v. *Winslow*, 227 U. S. 202, 33 S. Ct. 253, 57 L. Ed. 481, *United States* v. *United Shoe Machinery Company of N. J.*, 247 U. S. 32, and *United Shoe Machinery Corp.* v. *United States*, 258 U. S. 451, 42 S. Ct. 363, 66 L. Ed. 708, reviewed aspects of this company's, or its predecessor's activities. What United is now doing is similar to what it was then doing, but the activities which were similar stood uncondemned,—indeed, one ought to go further and say they were in part endorsed."

These amounted to a sanction of United's leasing and other business procedures up to the time of the actual decision in the Government case, and Judge Wyzanski's review of its history acquitted United of predatory practices and recognized its leases and leasing practices as "natural and normal, for they were, in Judge Hand's words, 'honestly industrial'." (110 F. Supp. at 343, 344)

In the special circumstances of United's history in the courts the rule of the Massachusetts court should not be taken to reflect pre-existing law. As to United it represented a change in law as of 1953. The District Court herein applied the 1953 remedy determination of the Massachusetts court as a pre-existing rule of substantive law. The Court of Appeals, however, adopted a compromise position and held that United was entitled to the benefit of its conformity with the antitrust law as it existed up to the date of the change therein effected by the *Alcoa* case and this Court's approval of *Alcoa* in the *American Tobacco* case in 1946 (110 F. Supp. at 348). The Court of Appeals recognized that the Blackstonian view

> ". . . that the law has always been what the latest case for the first time declares it to be . . . must yield to the practical realization that conduct had occurred in reliance on the earlier rules of law to the contrary." (Pet. 22a-23a)

Thus even the Court of Appeals to that extent recognized that United enjoyed "the approval of its leasing policy in various forms by three successive decisions of the Supreme Court" (Pet. 22a).

We submit that the decision in the *American Tobacco* case could have no bearing upon United as marking a change in its legal obligations until Judge Wyzanski in 1953, and this Court by its affirmance of his decision, so determined. Up to that time the leasing practices of United, which were fully before this Court on the three previous occasions, had judicial sanction in the context of United's particular business practices. Those were not the practices of Alcoa, nor were they the practices of American Tobacco Company. The rule announced in the *American Tobacco* case as to the requirement of exclusion of competitors,

confirming Judge Learned Hand's result in the *Alcoa* case, could not reasonably be deemed to have had a bearing on the leasing practices of United as previously approved by this Court until the trial court actually held that it did upon an analysis of the terms and the operation of the United leases.

**3. The Decree-Interpretation Question Should Have Been Certified to the Court Which Entered the Decree.**

Even if it were proper for the courts below to go beyond the Government decree to determine what was adjudged an antitrust violation and whether any such adjudication should be given retroactive effect, the lower courts' refusal to certify to Judge Wyzanski the interpretation of his antitrust decree gives rise to a conflict between the decision below and the very decree in question (aff'd. per curiam 347 US 527) as interpreted by Judge Wyzanski. Moreover, the refusal to certify conflicts with *United States Gypsum Co.* v. *National Gypsum Co.*, 352 US 457, on the appropriateness of such certification, represents an unwarranted departure from the proper course of judicial proceedings, and has spawned numerous errors of law in the erroneous use of the 1953 decree as a basis for finding pre-decree antitrust violation.

From a single reading of the Court of Appeals decision two facts stand out above all others. First, Hanover's action for treble damages rested entirely on the 1953 decree in the earlier Government action (728a-29a; see Pet. 5a) and, second, the principal task of the courts below was to interpret and apply Judge Wyzanski's decree. After the initial description of the trial of the Government action in terms of its "prodigious length", the extensive testimony and documentary evidence and finally the "elaborate opinion" of Judge Wyzanski (Pet. 2a-3a), the Court of Appeals makes constant reference to that decision, such

as "We turn then for illumination to the elaborate findings of fact and opinion of Judge Wyzanski" (Pet. 14a), "Judge Wyzanski made vividly clear" (Pet. 20a) and Judge Wyzanski stressed" (Pet. 21a).

What have become the most important questions of interpretation, however, are whether Judge Wyzanski intended to adjudicate that United's policy of offering its more important machines for lease-only constituted an antitrust violation and, if so, whether such adjudication should be given retroactive effect. United had good cause to believe that resort to Judge Wyzanski was unnecessary until Judge Sheridan held not only that the lease-only policy was illegal but also that retroactive effect should be given to a purely remedial decree. First, as the court below recognizes (adding that on the "face of the decree . . . United's contention is not lacking in merit" (Pet. 12a)), the Wyzanski decree nowhere declared that failure to sell was a means of monopolization, although the Government had in its complaint expressly so charged, and in addition the decree "dismissed with prejudice" all charges not otherwise dealt with (Pet. 13a). In fact, at the close of the Massachusetts action Government counsel had himself urged upon Judge Wyzanski (814a):

> "The remedial relief for which the Government is contending is intended to give an economically justifiable resolution to an economic condition or state of affairs. Such remedial relief does not depend upon the evaluation of the gravity or culpability of the individual practices engaged in by the defendant, and is not geared into such an assessment or evaluation."

Second, United's interpretation of the decree had been confirmed by the United States District Court for the Western District of New York on April 12 1963 in *W. B.*

*Coon Co.* v. *United Shoe Machinery Corp.*, Civil No. 6841, a treble damage action commenced by another shoe manufacturer with exactly the same form of complaint as Hanover's. In that case Judge Burke entered judgment for United and held that "Defendant's policy of lease-only as to certain machines during the period 1939 through 1954 was not by itself illegal."*

Thus, no need to seek a construction from Judge Wyzanski arose until Judge Sheridan's opinion was rendered below on April 28 1965 (800a). Thereafter, notice of United's application to Judge Wyzanski for a construction of his decree was given May 21 (806a), a hearing was held before Judge Wyzanski May 28 at which for comity reasons he refrained from formal action without a certification from Judge Sheridan (816a-44a), and the record on that application together with a motion by United for partial new trial and for a certification was filed with Judge Sheridan June 9 (801a-03a), all well before entry of judgment on August 13 1965.

Yet the requested certification was denied by Judge Sheridan and the Court of Appeals has upheld the denial, notwithstanding the Court of Appeals' belief (Pet. 25a, 26a)—

> "The obvious economy in judicial effort which would follow from such a practice [certifying the questions to Judge Wyzanski], especially in a case as protracted as the Government suit against United, speaks strongly in its favor."

* * *

*So, too, in *Laitram Corp.* v. *King Crab, Inc.*, 244 F. Supp. 9, 18 (D. Alaska 1965), the court stated that Judge Wyzanski held "that the leasing of machinery and refusing to sell does not constitute an unlawful practice in violation of the Sherman Act where the rates are uniform and do not weaken barriers to entry by competitors into the same field."

> "United contends with much force that Judge Wyzanski plainly indicated at the hearing his informal interpretation of the decree contrary to that of the court below."

Solely on the basis of supposed "untimeliness" the Court of Appeals concluded that it "need not determine this interesting question", citing *United States Gypsum Co.* v. *National Gypsum Co.*, 352 US 457.

In *Gypsum* the Court expressly approved submission to the antitrust court (District of Columbia) of questions arising in the treble damage court (Iowa) *after judgment in the treble damage court*—contrary to the result reached in the instant case. (*Id.* at 463-64) There too the need for such submission became apparent only after the decision. Here as in *Gypsum* the antitrust court's decree expressly retained antitrust jurisdiction in order that upon application of any of the parties the court might make such directions or orders as it deemed appropriate for the correction, construction and carrying out of the decree (806a-07a), and it was that reservation of jurisdiction which prompted the Supreme Court in *Gypsum* to conclude that submission to the antitrust court was appropriate to "avoid multiple litigation and possibly conflicting decision." (*Id.* at 464)

The raw injustice resulting from the denial of certification is best evidenced by Judge Wyzanski's plain intimation at the hearing on May 28 1965 of his disagreement with Judge Sheridan's construction. Having been advised by United's counsel that United sought to determine whether, contrary to Judge Sheridan's view, Judge Wyzanski by his decree did not adjudicate that the lease-only policy was an antitrust violation or retroactively condemn United's conduct (824a, 826a-27a), Judge Wyzanski stated to Gov-

ernment counsel in the presence of counsel for United and Hanover (834a-37a):

> "And I suppose you have no more doubt than Mr. Carson [United counsel] has as to what was my intention when I entered the Decree . . . . Have you thought it fit to tell Judge Sheridan that you have no more doubt than Mr. Carson about what the whole nature of the proceeding was? . . . Now that you are here, are you not aware from being here on previous occasions that *the government never contended, and I never ruled, as Judge Sheridan supposes the matter was decided?* Are you not aware of that? . . . I ask you as lawyer, on your honor as a lawyer. . . . I am asking you, and I will hold it as a statement of your character as well as your competence. . . . No one who knows me will misunderstand the nature of my questions and comments even if on the jurisdictional ground I find it inappropriate to give the relief asked." (Italics supplied)

Judge Wyzanski refused on the ground of comity to intrude his views in the absence of a certification from his fellow judge (841a-43a; Pet. 26a), clearly indicating a willingness to certify his opinion upon request in the manner encouraged by this Court for consultation between State and Federal courts (831a-32a). At the conclusion Judge Wyzanski also added reference to the remarks quoted above;

> "But I deem it appropriate expressly to call attention to the full range of the colloquy which preceded my ruling as well as briefly to summarize what seemed to me to be the determinative considerations." (841a)

* * *

> ". . . I cannot understand how any person who was familiar with the whole course of this litigation could have any doubt whatsoever as to what had been my view of the conduct of the defendant, of the degree to which it had violated the Act and the degree to which the Decree was addressed beyond eliminating violations to setting forth a program of future conduct which would make it hereafter less likely that the violations could continue." (843a)

In obvious awareness of the injustice being worked with his decree Judge Wyzanski with characteristic prescience saw fit to add (842a):

> "I have that regard for Judge Sheridan personally and for the Court on which he sits to be loath to intervene at this stage in a way that at any rate the general public would assume to be a kind of review of his action, and indeed, if I decided as I am asked to decide, an undercutting of his position. There are available remedies by way of appeal certainly to the Court of Appeals for the Third Circuit; and if by any chance that Court should affirm the Decree of the District Court, this would appear to be the kind of case in which the Supreme Court of the United States might well indulge its power to grant a petition for certiorari."

**4. The Legality and Reasonableness of the Leases Preclude Recovery**

The courts below refused to recognize the controlling effect of the legality of the leases challenged. While Hanover attacked the leases executed between it and United for illegality and claimed the rental and other charges thereunder were excessive, arbitrary and non-competitive (18a-

19a), this claim was denied by the District Court, which held the leases to be legal and the charges thereunder reasonable (750a-53a). Nevertheless, recovery was granted to Hanover on the theory that it was entitled to the purchase of the machines as an alternative, and to damages for the difference if such purchase could be demonstrated to be cheaper. The trial court paid no attention to the legality of the leases "because Hanover is not suing on them" (753a). The Court of Appeals took a similar position (Pet. 8a-9a).

This Court in *Bruce's Juices, Inc.* v. *American Can Co.*, 330 US 743, 752, in enforcing payment of purchase notes connected with allegedly illegal price discriminations, held that in the related treble damage suit Bruce's Juices would have to prove the prices charged to be illegal "in order to win". Here we have a holding that the lease prices were legal, Hanover's claim to damages being through a substituted sale price.

It is submitted that the conceded legality and reasonableness of the transactions actually had between the parties cuts off the refusal-to-sell avenue of recovery and that the failure of the courts below so to recognize was manifest error. Indeed, the Court of Appeals itself recognizes (Pet. 9a, n. 3) the conflict between its decision and that in *Turner Glass Corp*, v. *Hartford-Empire Co.*, 173 F. 2d 49 (CA 7 1949), cert. denied 338 US 839, rehearing denied 338 US 881.

**5. Reflection of Cost of Capital Would Demonstrate the Absence of Damage**

So, too, the courts below in their comparison of putative cost of purchase with cost of lease refused to take into account the cost of capital to one who chooses to purchase. The Court of Appeals overlooked the fact that *economists for both United and the shoe manufacturers as a whole had*

*conceded the vital importance* of this factor (350a-53a 597a-606a) in the negotiations for the plan of terminating United's old leases under paragraph 9 of Judge Wyzanski's decree (110 F. Supp. at 353). A proper application of cost of capital in the purchase-lease equation would have eliminated the supposed monetary advantages of purchase, as found by the District Court, and indeed demonstrated the advantages of lease.

The cost of capital factor was wrongly disregarded by the District Court and erroneously treated by the Court of Appeals as a "novel concept". In fact, it was basic to the purchase problem involved in this case and recognized as such by the parties in settlement of the plan under Judge Wyzanski's decree (350a-53a, 597a-606a). Here, as in the case of the tax ramifications recognized as appropriate by the Court of Appeals (Pet. 31a), it is "a distortion of reality" not to recognize cost of capital as a factor basic to the choice between purchasing and leasing.

**6. Any Excess of Cost of Leasing Over Cost of Ownership Was Not Absorbed by Hanover.**

In addition, the courts below failed to recognize that recoupment by Hanover of the lease charges in its sales prices eliminated any legal injury. The record filed in this Court upon United's previous application for certiorari with respect to the passing-on issue* demonstrates that as a matter of regular accounting practice Hanover, like its competitors, carried into its sale prices and recouped in its annual income statement the entire cost of the shoe machinery involved in this suit. That fact, however, has been held to be immaterial to Hanover's suit for damages on the ground that Hanover had its claim at the times of

*October Term 1960 No. 425, denied 364 US 901.

the assumed overcharges even if they were passed on (185 F. Supp. 826, 829, aff'd 281 F. 2d 481).

Such holding is contrary to the rule followed in the oil jobber cases. *Clark Oil Co.* v. *Phillips Petroleum Co.*, 148 F. 2d 580 (CA 8 1945), cert. denied 326 US 734; *Northwestern Oil Co.* v. *Socony-Vacuum Oil Co.*, 138 F. 2d 967 (CA 7 1943), cert. denied 321 US 792; *Leonard* v. *Socony-Vacuum Oil Co.*, 42 F. Supp. 369 (WD Wis.), appeal dismissed on other grounds 130 F. 2d 535 (CA 7 1942); *Twin Ports Oil Co.* v. *Pure Oil Co.*, 119 F. 2d 747 (CA 8 1941), cert. denied 314 US 644. The Third Circuit itself has not followed the rule which it announced in the *Hanover* case where the charges passed on to the public involved payment for terminals. *Freedman* v. *Philadelphia Terminals Auction Co.*, 301 F. 2d 830, 832 (CA 3, 1962), cert. denied 371 US 829.

This varying construction of the same concept of injury contained in Clayton Act § 4 is unsound and should be corrected by review in this Court. The fact that Hanover was a consumer of the product and the plaintiff in *Freedman* a middleman (made a ground of distinction in 301 F. 2d at 833) is meaningless. See Pollock, *Standing to Sue, Remoteness of Injury, and the Passing-On Doctrine*, 32 A. B. A. Antitrust Law Journal 5, 26-29 (1966). In view of Hanover's pricing system and its highly profitable operation, the fact is that there was no injury to the "business or property" of Hanover at the hands of United.

**7. Hanover's Failure to Demand Purchase of Machines Indicates Absence of Injury and Precludes Recovery.**

The failure of Hanover to demand that United sell instead of lease machines is a further bar to assertions of injury, not to say powerful evidence that there was no injury. Hanover for decades leased United's shoe machin-

ery without protest of any kind as to the leasing system and without demand of any sort to purchase the shoe machinery which it acquired by lease. The trial court recognized that Hanover never asked to buy the lease-only machines and did not protest its inability to buy (759a). This absence of any request or protest is excused by the courts below on the erroneous ground that a demand would in any event have been futile (Pet. 6a).

Yet the requirement of prior demand is clearly justified and has been unanimously imposed by Courts of Appeal in other cases. *Lawlor* v. *National Screen Service Corp.*, 270 F. 2d 146, 154 (CA 3 1959), cert. denied 362 US 922; *Webster Rosewood Corp.* v. *Schine Chain Theatres, Inc.*, 263 F. 2d 533 (CA 2 1959), cert. denied 360 US 912; *J. J. Theatres, Inc.* v. *Twentieth Century-Fox Film Corp.*, 212 F. 2d 840, 845 (CA 2 1954); *Milwaukee Towne Corp.* v. *Loew's, Inc.*, 190 F. 2d 561, 568 (CA 7 1951), cert. denied 342 US 909; *Royster Drive-In Theatres, Inc.* v. *American Broadcasting-Paramount Theatres, Inc.*, 268 F. 2d 246, 251 (CA 2 1959), cert. denied 361 US 885; see also *608 Hamilton Street Corp.* v. *Columbia Pictures Corp.*, 244 F. Supp. 193, 195 (ED Pa. 1965). Reliance is misplaced by the Court of Appeals (Pet. 6a) on *Continental Ore Co.* v. *Union Carbide and Carbon Co.*, 370 US 690, 698, in which the Court reversed dismissal of a private antitrust suit, since the Court found that actual prior demands had been made.

Waiver by the courts below of the necessity of prior demand in such a case as this is an open sesame to injustice. Hanover postponed any claim to buy United's shoe machines until after entry of the Government decree and promulgation of a plan for termination of the outstanding leases (761a). In the tranquil relationship between the parties extending back at least to 1912 (6a-7a) United had every right to assume that Hanover was completely satisfied

with the terms—adjudged reasonable by the courts below—on which if used the United machinery, equally with all other shoe manufacturers, to the increasing prosperity of Hanover. Substitution after the fact of an artificial and concocted sale price for the previously agreed lease terms and erection of the differential into a judgment for treble damages is an artificial operation repugnant to accepted standards of good faith and fair dealing. The function of prior demand is to put the claimant on record, put the supplier on notice and obviate such surprise tactics. Contentions as to the futility of demand do not destroy this valuable function. The claimant of a right of purchase must in all equity and fairness make overt assertion of that right before he can penalize the supplier with an imputed refusal on which damages are to be calculated and then trebled.

Moreover, if the *Alcoa* and *American Tobacco* decisions were enough to apprise United of a change in law as regards its leasing system (Pet. 22a-23a, 27a), certainly a demand by Hanover after the change in law could not be presumed futile.

**8. Recovery is Barred by Limitations.**

If injury had in fact been inflicted on the theory adopted by the trial court that the leasing system, which prevented Hanover from purchasing the United machines, was a monopolizing activity and had been held by Judge Wyzanski to be so from the beginning, the applicable statute of limitations (Pet. 26a-27a, 34a) necessarily would run from the inception of the lease relations between the parties in 1912 or earlier and the bar would have been completed early in the century. The trial court rejected this contention on the theory that United's monopolization was a continuing wrong (797a). However, this use of the concept of continuing wrong to circumvent the statute of limitations is

unsound because it "would effectively destroy the statute of limitations as a statute of peace." *Sherman* v. *Goerlichs*, 238 F. Supp. 728, 730 (ED Mich. 1963), aff'd per curiam, 341 F. 2d 988 (CA 6 1965), cert. denied 382 US 830; *Farbenfabriken Bayer, A. G.* v. *Sterling Drug, Inc.*, 153 F. Supp. 589 (D. N. J. 1957), aff'd on other grounds 307 F. 2d 210 (CA 3 1962).

The Court of Appeals rested its decision on another ground, viz., that under its holdings with respect to the limited retroactivity of Judge Wyzanski's decree United's putative duty to sell as established by the 1953 decree did not come into existence until 1946 and therefore no injury could have occurred before 1946 (Pet. 27a). In its supplemental opinion of May 18 that court added that United's conduct continuing within the limitations period "went beyond a mere continuation of the refusal to sell" and consisted of repeated collection of rentals on leases and repeated entry into new leases within the limitations period (Pet. 36a-37a).

As a matter of legal quality United's conduct after 1946 was exactly the same as its previous conduct, namely, a failure to sell the lease-only machines which (in point of fact) Hanover did not ask to buy. It is not the collection of rentals on leases admittedly legal and reasonable nor the entry into new machine leases of unquestioned legality and reasonableness which constituted the wrong charged. The wrong charged is the failure to offer for sale the machine types which Hanover held on lease in the damage period, and that failure pursued the same even and unchanging trend from 1899 to 1955. If a legal wrong at all, it was such more than 50 years ago. Adherence to the policy did not accrue new actions and the statute of limitations should operate as a complete defense even assuming a violation.

## Conclusion

On all the grounds stated, if the petition in No. 335 is granted, this petition should also be granted and the cases consolidated for argument.

Dated: New York, New York
August 4, 1967.

Respectfully submitted,

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SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
AUG 21 1967
JOHN F. DAVIS, CLERK

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1967

No. 463

UNITED SHOE MACHINERY CORPORATION,
*Petitioner,*

*v.*

THE HANOVER SHOE, INC.,
*Respondent.*

## BRIEF IN OPPOSITION TO CROSS-PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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IN THE

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## BRIEF IN OPPOSITION TO CROSS-PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

The cross-petition of petitioner, United Shoe Machinery Corporation (hereinafter United), is conditional in that United asks that the writ issue to review its various contentions only in the event that this Court grants the petition filed by The Hanover Shoe, Inc. (hereinafter Hanover) in *The Hanover Shoe, Inc.* v. *United Shoe Machinery Corporation,* No. 335, Oct. Term, 1967.

United's conditional cross-petition does no more, we submit, than complain of alleged errors of the Court of Appeals below and does not present any special or important reasons why it should be granted. In point 6 the cross-petition even reasserts an issue raised in a separate trial before the District Court, reviewed by the Court of Appeals as a controlling question of law under Section

1292(b) of the Judicial Code and on which this Court denied certiorari in October Term 1960!

We shall, however, comment briefly on each point presented by United:

**1. Point 1: "Lease-Only Was Not Adjudged a Violation," Cross-Petition pp. 8-10.**

This is no more than a complaint of "an injustice to United," id. p. 9, by the decision below. United closes its eyes to the dominant thrust of Judge Wyzanski's findings and conclusions in *United States* v. *United Shoe Machinery Corporation,* 110 Fed. Supp. 295 (D. Mass. 1953), affirmed per curiam, 347 U. S. 521 (1954) (hereinafter the "Government case"), holding that it was the "lease only" policy, buttressed by the restrictive provisions of United's leases, that violated Section 2 of the Sherman Act (16a).*

No point is made as to why this "injustice to United" should be reviewed by this Court.

**2. Point 2: "The Government Decree is Not Retroactive," Cross-Petition pp. 10-12.**

An important item of Hanover's proof of United's monopolization of the shoe machinery trade was the final decree and certain findings and conclusions of the District Court in the Government case.

United urged in both Courts below that the decree in the Government case operated only prospectively from the date of its entry in 1953. The Court of Appeals below rejected this argument but adopted the novel concept of limited retroactivity extending only to June 10, 1946, the date of the decision of this Court in *American Tobacco Co.,* v. *United States,* 328 U. S. 781. Hanover seeks review of

* The reference is to the opinion of the Court of Appeals printed and bound with Hanover's petition for a writ of certiorari in No. 335.

this holding in No. 335 because of its important effect upon the application of the antitrust laws.

As to United's contention, no reason for review is given other than a claim of error.

**3. Point 3: "The Decree-Interpretation Question Should Have Been Certified to the Court Which Entered the Decree," Cross-Petition pp. 12-17.**

The principal complaint here seems to be of "The raw injustice" id. p. 15 to United of the decision of the Court of Appeals in finding the "untimeliness" of United's effort and in finding no "abuse of discretion" by the District Court in rejecting United's belated request (26a).

Nothing is presented here that requires reply.

**4. Point 4: "The Legality and Reasonableness of the Leases Preclude Recovery," Cross-Petition pp. 17-18.**

Here United complains only of "manifest error," id. p. 18. Again, we see no need for reply.

**5. Point 5: "Reflection of Cost of Capital Would Demonstrate the Absence of Damage," Cross-Petition pp. 18-19.**

The text here is no more than a complaint as to the decision of both courts below holding invalid a method of calculating damages which United claimed should have been utilized by the District Court. It requires no reply.

**6. Point 6: "Any Excess of Cost of Leasing Over Cost of Ownership Was Not Absorbed by Hanover," Cross-Petition pp. 19-20.**

This is an attempt to revive United's defense that Hanover suffered no damage because it passed on the

excess shoe machinery costs in the sales prices of the shoes it sold. A separate trial on this "passing-on" issue was held under Rule 42(b) of the Federal Rules of Civil Procedure before the District Court in 1960, 185 F. Supp. 826. The decision of the District Court in which the claim of United was rejected, was affirmed by the Court of Appeals, per curiam, 281 F. 2d 481 and this Court denied certiorari, 364 U. S. 901 (1960).

It is extraordinary to find United once more trying to secure a review of this issue by this Court.

**7. Point 7: "Hanover's Failure to Demand Purchase of Machines Indicates Absence of Injury and Precludes Recovery," Cross-Petition pp. 20-22.**

Again, this is no more than a complaint as to the decision of both courts below. It is no more than a claim of error. No grounds are stated to call for review by this Court.

**8. Point 8: "Recovery is Barred by Limitations," Cross-Petition pp. 22-23.**

In this last point United still complains of the decisions of both courts below. It still advances no reason why this Court should review the claimed errors.

## CONCLUSION

**For the foregoing reasons, United's conditional cross-petition should be denied.**

Respectfully submitted,

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August 18, 1967

SUPREME COURT, U. S.

NOV 24 1967

JOHN F. DAVIS, CLERK

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1967

No. 463

UNITED SHOE MACHINERY CORPORATION,
*Petitioner,*

*v.*

THE HANOVER SHOE, INC.,
*Respondent.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

## BRIEF FOR PETITIONER

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November 22 1967

## TABLE OF CONTENTS


| | PAGE |
|---|---|
| Opinions Below | 1 |
| Jurisdiction | 2 |
| Statutes Involved | 2 |
| Questions Presented | 3 |
| STATEMENT OF THE CASE | 4 |
| 1. The Parties and the Lease Transactions | 4 |
| 2. Decree in the Government Suit | 7 |
| 3. Treble Damage Litigation Arising Out of the Government Decree | 13 |
| 4. Hanover's Case | 14 |
| (a) Passing-On Trial Before Goodrich, J. | 15 |
| (b) Plenary Trial Before Sheridan, J. | 16 |
| (c) Hearing Before Wyzanski, J., and Refusal of Sheridan, J. to Certify Questions | 17 |
| (d) Court of Appeals Decision | 21 |
| SUMMARY OF ARGUMENT | 22 |
| ARGUMENT | 27 |
| I. THE COURT BELOW ERRED BY INTERPRETING THE GOVERNMENT DECREE AS A DETERMINATION THAT UNITED'S PRACTICE TO LEASE RATHER THAN TO SELL WAS UNLAWFUL | 27 |
| A. The decree in the Government suit makes it clear that United's lease-only policy was not held to be a means of monopolization | 27 |

PAGE

B. If the decree were unclear, the opinion and findings of the district court and contentions of the parties show conclusively that United's lease-only policy was not held to constitute monopolization ..... 29

C. If any doubt remained that Judge Wyzanski did not hold United's lease-only policy to be monopolization, this question should have been certified to Judge Wyzanski, and refusal to certify was an abuse of discretion.. 33

D. Clayton Act § 5(a) limits *prima facie* status to findings made expressly or by necessary implication in the Government case, so that it was error for the courts below to make lease-only a violation by inference ..... 38

E. Hanover may not rely upon the decree in the Government suit because Hanover was not among those found by Judge Wyzanski to be affected by the exclusionary features of United's leases ..... 41

II. EVEN IF JUDGE WYZANSKI HAD HELD UNITED'S LEASE-ONLY POLICY ITSELF TO BE A VIOLATION, INJURY AND THREE-FOLD DAMAGES SHOULD NOT BE BUILT UPON A RETROACTIVE APPLICATION OF SUCH HOLDING ..... 43

A. United had no reason to believe that its lease-only policy constituted monopolization 43

(1) This Court had approved the features of United's leases which the Government suit attacked ..... 43

(2) Judge Hand's holding in *Alcoa*, approved by this Court in *American Tobacco*, gave United no reason to believe that its lease-only policy constituted monopolization ..... 46

PAGE

B. The retrospective award of treble damages in this case is grossly unfair ..... 49

(1) Treble damages should not be awarded on the basis of a changed rule of anti-trust law ..... 49

(2) Retrospective imposition of treble damages under Judge Wyzanski's standard of monopolization would be especially unjust ..... 52

III. EVEN ON ALL THE ASSUMPTIONS ADVERSE TO THE FOREGOING ARGUMENT (i.e. with the Wyzanski decree determinative of the illegality of lease-only and with retroactive application of a change in the law), NEVERTHELESS HANOVER SUSTAINED NO INJURY BECAUSE IT WOULD NOT HAVE BOUGHT THE MACHINES ..... 52

A. Rational economic choice would have dictated leasing ..... 52

B. Hanover's failure to demand the right to buy machines in the complaint period, owing presumably to the economic undesirability of purchase, precludes this suit for refusal to sell since prior demand is a condition precedent ..... 57

IV. HANOVER SUSTAINED NO DAMAGE FROM UNITED'S LEASE-ONLY POLICY ..... 61

A. Cost of capital considerations show that Hanover sustained no loss by leasing ..... 61

B. Any excess of cost of leasing over cost of ownership was not absorbed by Hanover but passed on to others ..... 61

V. RECOVERY IS BARRED BY THE PENNSYLVANIA SIX-YEAR STATUTE OF LIMITATIONS ..... 66

CONCLUSION ..... 71

## TABLE OF CASES


| | PAGE |
|---|---|
| *Aldrich* v. *Aldrich* 375 US 75 and 249 | 35 |
| *Allied Shoe Mach. Co.* v. *United Shoe Mach. Corp.* D. Mass Civ. 54-815-M, dismissed on settlement November 20 1957 | 13 |
| *American Securit Co.* v. *Shatterproof Glass Corp.* 268 F. 2d 769, cert. denied 361 US 902 | 37 |
| *American Tobacco Co.* v. *United States* 328 US 781 | 22, 25-6, 46-8, 50, 59 |
| *Anniston Mfg. Co.* v. *Davis* 301 US 337 | 62 |
| *Armco Steel Corp.* v. *North Dakota* 376 F. 2d 206 | 66 |
| *Atlantic City Elec. Co.* v. *General Elec. Co.* 226 F. Supp. 59, appeal denied 337 F. 2d 844 | 65 |
| *Bell* v. *Morrison* 26 US (1 Pet.) 351 | 67 |
| *Bernath* v. *LeFever* 325 Pa. 43, 189 A. 342 | 68 |
| *Bigelow* v. *RKO Radio Pictures, Inc.* 327 US 251 | 53 |
| *Brown* v. *Western Mass. Theatres, Inc.* 288 F. 2d 302 | 57 |
| *Buckhead Theatre Co.* v. *Atlanta Enterprises, Inc.* 327 F. 2d 365, cert. denied 379 US 888 | 39 |
| *Burlen* v. *Shannon* 99 Mass. 200 | 39 |
| *Campbell Distrib. Co.* v. *Jos. Schlitz Brewing Co.* 208 F. Supp. 523 | 68 |
| *Chattanooga Foundry & Pipe Works* v. *City of Atlanta* 203 US 390 | 43 |
| *City of Joliet* v. *Blower* 155 Ill. 414, 40 NE 619 | 64 |
| *Clark Oil Co.* v. *Phillips Petroleum Co.* 148 F. 2d 580, cert. denied 326 US 734 | 63 |
| *Clay* v. *Sun Ins. Office Ltd.* 363 US 207 | 35 |
| *Cole* v. *Hughes Tool Company* 215 F. 2d 924, cert. denied 348 US 927 | 32 |
| *Columbia Pictures Corp.* v. *Charles Rubenstein, Inc.* 289 F. 2d 418 | 57 |
| *Commissioner* v. *Glenshaw Glass Co.* 348 US 426 | 50 |

PAGE

*Commonwealth Edison Co.* v. *Allis-Chalmers Mfg. Co.* 315 F. 2d 564, cert. denied 375 US 834 ..... 65

*Commonwealth Edison Co.* v. *Allis-Chalmers Mfg. Co.* 335 F. 2d 203 ..... 64–5

*Compo Shoe Mach. Corp.* v. *United Shoe Mach Corp.* D. Mass. Civ. 54-472-M, dismissed on settlement February 25 1957 ..... 13

*Conference of Studio Unions* v. *Loew's Inc.* 193 F. 2d 51, cert. denied 342 US 919 ..... 41

*Congress Bldg. Corp.* v. *Loew's, Inc.* 246 F. 2d 587 .. 60

*Continental Ore Co.* v. *Union Carbide & Carbon Corp.* 289 F. 2d 86, rev'd 370 US 690 ..... 57, 59, 60

*W. B. Coon Co.* v. *United Shoe Mach. Corp.* WDNY Civil No. 6841, dismissed April 12 1963 .... 13, 19, 32, 35

*Dart Drug Corp.* v. *Parke, Davis & Co.* 344 F. 2d 173 39

*Dresner* v. *City of Tallahassee* 375 US 136 ..... 35

*Eagle Lion Studios, Inc.* v. *Loew's, Inc.* 248 F. 2d 438, aff'd *per curiam* 358 US 100 ..... 42

*Emich Motors Corp.* v. *General Motors Corp.* 340 US 558 ..... 38

*Emich Motors Corp.* v. *General Motors Corp.* 229 F. 2d 714 ..... 68

*England* v. *Louisiana State Bd. of Medical Examiners* 375 US 411 ..... 35, 50

*Erie R.R.* v. *Tompkins* 304 US 64 ..... 51

*Ethyl Gasoline Corp.* v. *United States* 309 US 436 .. 31

*The Evergreens* v. *Nunan* 141 F. 2d 927, cert. denied 323 US 720 ..... 40

*Farmington Dowel Prods. Co.* v. *Forster Mfg. Co., Inc.* 1967 Trade Cas. ¶ 72,262 ..... 39

*FTC* v. *National Lead Co.* 352 US 419 ..... 31

*Freedman* v. *Philadelphia Terminals Auction Co.* 301 F. 2d 830, cert. denied 371 US 829 ..... 64

*Fruit Mach. Co.* v. *F. M. Ball & Co.* 118 Cal. App. 2d 748, 258 P. 2d 852 ..... 33

PAGE

*Gaetzi* v. *Carling Brewing Co.* 205 F. Supp. 615 .... 71
*Garelick* v. *Goerlich's, Inc.* 323 F. 2d 854 ..... 70
*Gelpcke* v. *City of Dubuque* 68 US (1 Wall.) 175 ... 51
*Gottesman* v. *General Motors Corp.* 221 F. Supp. 488 39
*Green* v. *Rivett* 2 Salk. 421, 91 Eng. Rep. 367 (K.B. 1702) ..... 66
*Guaranty Trust Co.* v. *United States* 304 US 126 ... 67

*Hartford-Empire Co.* v. *United States* 323 US 386 .. 45
*Hopkins* v. *Lee* 19 US (6 Wheat.) 109 ..... 40

*International Salt Co., Inc.* v. *United States* 332 US 392 ..... 31
*International Shoe Mach. Corp.* v. *United Shoe Mach. Corp.* 315 F. 2d 449, cert. denied 375 US 820 ....13, 39

*J. J. Theatres, Inc.* v. *Twentieth Century-Fox Film Corp.* 212 F. 2d 840 ..... 57
*Johnson* v. *New Jersey* 384 US 719 ..... 50

*Karseal Corp.* v. *Richfield Oil Corp.* 221 F. 2d 358 .. 42
*Kelly* v. *Kosuga* 358 US 516 ..... 13
*Keogh* v. *Chicago & N.W. Ry.* 260 US 156 .....62–3

*Laitram Corp.* v. *King Crab, Inc.* 244 F. Supp. 9, modified on another ground 245 F. Supp. 1019 ... 33
*Lawlor* v. *National Screen Serv. Corp.* 270 F. 2d 146, cert. denied 362 US 922 ..... 57
*Linkletter* v. *Walker* 381 US 618 .....50, 51
*Lyons* v. *Westinghouse Elec. Corp.* 235 F. Supp. 526 .....49, 50

*Marrero Morales* v. *Bull S.S. Co.* 279 F. 2d 299 .... 69
*Milwaukee Towne Corp.* v. *Loew's, Inc.* 190 F. 2d 561, cert. denied 342 US 909 .....57-8, 60
*Minnesota Mining & Mfg. Co.* v. *New Jersey Wood Finishing Co.* 381 US 311 ..... 40

PAGE

*Missouri* v. *Stupp Bros. Bridge & Iron Co.* 248 F. Supp. 169, certificate to appeal denied 249 F. Supp. 111 ..... 66

*Monticello Tobacco Co., Inc.* v. *American Tobacco Co.* 197 F. 2d 629, cert. denied 344 US 875 ..... 38

*Mosser* v. *Darrow* 341 US 267 ..... 50

*Muskin Shoe Co., Riverside Shoe Corp., and Oriole Shoe Co.* v. *United Shoe Mach. Corp.* D. Md. Civ. 9717, 9718, 9719, 167 F. Supp. 106, dismissed by order dated January 4 1963 ..... 13

*Norman Tobacco & Candy Co., Inc.* v. *Gillette Safety Razor Co.* 197 F. Supp. 333, aff'd 295 F. 2d 362 ..68, 70

*Northwestern Oil Co.* v. *Socony-Vacuum Oil Co.* 138 F. 2d 967, cert. denied 321 US 792 ..... 63

*Ohio Valley Elec. Corp.* v. *General Elec. Co.* 244 F. Supp. 914 ..... 64

*Order of R.R. Telegraphers* v. *Railway Express Agency, Inc.* 321 US 342 ..... 69

*Palsgraf* v. *Long Island R.R.* 248 NY 339, 162 NE 99 42

*Paramount Film Distrib. Corp.* v. *Applebaum* 217 F. 2d 101, cert. denied 349 US 961 ..... 57

*Partmar Corp.* v. *Paramount Pictures Theatres Corp.* 347 US 89 ..... 38

*Peto* v. *Madison Square Garden Corp.* 1965 Trade Cas. ¶ 71,398 ..... 71

*Productive Inventions, Inc.* v. *Trico Prods. Corp.* 224 F. 2d 678, cert. denied 350 US 936 ..... 42

*Public Util. Dist. No. 1* v. *General Elec. Co.* 230 F. Supp. 744 ..... 64

*Rapid Shoe Mach. Mfg. Co.* v. *United Shoe Mach. Corp.* SDNY Civ. 104-158, dismissed on trial December 16 1959 ..... 13

*Royster Drive-In Theatres, Inc.* v. *American Broadcasting-Paramount Theatres, Inc.* 268 F. 2d 246, cert. denied 361 US 885 ..... 57

PAGE

*Schine Chain Theatres, Inc.* v. *United States* 334 US 110 ..... 31
*Schwabe (Herman), Inc.* v. *United Shoe Mach. Corp.* 297 F. 2d 906, cert. denied 369 US 865 ..... 13
*Service Stages Inc.* v. *Greyhound Corp.* 170 F. Supp. 482, aff'd *per curiam* 268 F. 2d 739 ..... 68
*Sherman* v. *Goerlichs, Inc.* 238 F. Supp. 728, aff'd 341 F.2d 988 ..... 70
*Simpson* v. *Union Oil Co.* 377 US 13 ..... 49
*Simpson* v. *Union Oil Co.* 270 F. Supp. 754 ..... 49
*Snow Crest Beverages, Inc.* v. *Recipe Foods, Inc.* 147 F. Supp. 907 ..... 42
*South Carolina Council of Milk Producers, Inc.* v. *Newton* 360 F. 2d 414, cert. denied 385 US 934 ..... 42
*Southern Pac. Co.* v. *Darnell-Taenzer Lumber Co.* 245 US 531 ..... 64
*Standard Oil Co.* v. *Moore* 251 F. 2d 188, cert. denied 356 US 975 ..... 57
*State ex rel. Washington State Fin. Comm.* v. *Martin* 62 Wash. 2d 645, 384 P. 2d 833 ..... 51

*Tehan* v. *United States ex rel. Shott* 382 US 406 ..... 50
*Theatre Enterprises, Inc.* v. *Paramount Film Distrib. Corp.* 346 US 537 ..... 39
*Tidal Oil Co.* v. *Flanagan* 263 US 444 ..... 51
*Town of Basic City* v. *Bell* 114 Va. 157, 76 SE 336 ..... 63
*Twin Ports Oil Co.* v. *Pure Oil Co.* 119 F. 2d 747, cert. denied 314 US 644 ..... 63

*Union Carbide & Carbon Corp.* v. *Nisley* 300 F. 2d 561, cert. dismissed 371 US 801 ..... 65
*United States* v. *Aluminum Co. of America* 148 F. 2d 416 ..... 25-6, 46-8, 59
*United States* v. *Bausch & Lomb Optical Co.* 321 US 707 ..... 31
*United States* v. *Grinnell Corp.* 384 US 563 ..... 48
*United States* v. *Jefferson Elec. Mfg. Co.* 291 US 386 62
*United States* v. *Loew's Inc.* 371 US 38 ..... 31

PAGE

*United States* v. *United Shoe Mach. Co.* 222 Fed. 349, aff'd 247 US 32 ..... 43–5
*United States* v. *United Shoe Mach. Co.* 234 Fed. 127, 264 Fed. 138, aff'd in part 258 US 451 ..... 45–6
*United States* v. *United Shoe Mach. Corp.* 110 F. Supp. 295, aff'd *per curiam* 347 US 521 ..... 5-14, 28, 30-1, 36, 41-2, 48-9
*United States* v. *United Shoe Mach. Corp.* 266 F. Supp. 328 ..... 11, 46
*United States* v. *United States Gypsum Co.* 340 US 76 31
*United States* v. *Winslow* 195 Fed. 578, aff'd in part 227 US 202 ..... 43
*United States Gypsum Co.* v. *National Gypsum Co.* 352 US 457 ..... 18, 31, 34-6

*Versluis* v. *Town of Haskell* 154 F. 2d 935 ..... 69

*Washington* v. *American Pipe & Constr. Co.* 1967 Trade Cas. ¶ 72,233 ..... 66
*Washington* v. *General Elec. Co.* 246 F. Supp. 960 ..... 66
*Webster Rosewood Corp.* v. *Schine Chain Theatres, Inc.* 263 F. 2d 533, cert. denied 360 US 912 ..... 39, 57
*Wolfe* v. *National Lead Co.* 225 F. 2d 427, cert. denied 350 US 915 ..... 63

*Yates* v. *United States* 354 US 298 ..... 40

## STATUTES

Clayton Act

§ 4, 38 Stat. 731 (1914), 15 USC § 15 ..... 2-4, 62-3, 65
§ 5(a), 69 Stat. 283 (1955), 15 USC § 16(a) ..... 2-3, 16, 23, 25, 27, 35, 38, 40, 42

Federal Communications Act § 201(a), 48 Stat. 1070 (1934), 47 USC § 201(a) ..... 58

Interstate Commerce Act § 1(4), 54 Stat. 900 (1940), 49 USC § 1(4) ..... 58

PAGE

Sherman Act § 1, 26 Stat. 209 (1890), 15 USC § 1 ..... 43-4, 49

Sherman Act § 2, 26 Stat. 209 (1890), as amended 69 Stat. 282 (1955), 15 USC § 2 ..... 2, 8, 23-4, 26, 43-4

1 Sm. L. 76 (1713), 12 Purdon's Pa. Stats. § 31 ..... 2

Uniform Commercial Code § 2-311(3) ..... 58

28 USC § 1254(1) ..... 2

## OTHER AUTHORITIES

Advisory Committee's Note to Proposed Amended Rule 23, 39 F.R.D. 98 (1966) ..... 66

American Law Institute, Study of the Division of Jurisdiction Between State and Federal Courts (Tent. Draft No. 5, 1967) ..... 35, 36

Annotation, *Prospective or Retroactive Operation of Overruling Decision,* 10 ALR 3d 1371 (1966) ..... 51

Comment, *Abstention and Certification in Diversity Suits,* 73 Yale L.J. 850 (1964) ..... 36

Congressional Record (1890), Vol. 21 pp. 2600, 2731, 2901 ..... 63

Freeman, Judgments (5 ed. Tuttle 1925) ..... 40

Moore, Federal Practice (2 ed. 1965) ..... 40

Note, *Private Treble Damage Antitrust Suits: Measure of Damages for Destruction of All or Part of a Business,* 80 Harv. L. Rev. 1566 (1967) ..... 63–4

Order of Supreme Court of the United States Amending Rules of Civil Procedure for United States District Courts, 383 US 1031, 1047 ..... 65

Pollock, *Standing to Sue, Remoteness of Injury, and the Passing-On Doctrine,* 32 ABA Antitrust L. J. 5 (1966) ..... 64

Pond, Public Utilities (4 ed. 1932) ..... 58

PAGE

Report of The Attorney General's National Committee to Study the Antitrust Laws (1955) ..... 47

Restatement, Torts (1939) ..... 63

Schaefer, *The Control of "Sunbursts": Techniques of Prospective Overruling*, 22 N.Y. City Bar Assn. *Record* 394 (1967) ..... 51

Wyman, Public Service Corporations (1911) ..... 57

IN THE

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OCTOBER TERM, 1967

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*Petitioner,*

v.

THE HANOVER SHOE, INC.,
*Respondent.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

## BRIEF FOR PETITIONER

United Shoe Machinery Corporation, defendant below, prays for reversal of the judgment of the Court of Appeals for the Third Circuit entered June 7 1967 on opinions dated April 11 and (on rehearing) May 18 1967 and of the United States District Court for the Middle District of Pennsylvania entered August 13 1965, and for dismissal of the case.

### Opinions Below

The opinions of the Court of Appeals dated April 11 and May 18 1967 are reported in 377 F. 2d 776, 793. The opinions of the District Court for the Middle District

of Pennsylvania dated April 28 and August 12 1965 are reported in 245 F. Supp. 258, 299. On the trial of a preliminary issue under Federal Rule 42(b) the opinion of the District Court dated February 12 1960 is reported in 185 F. Supp. 826, that of the Court of Appeals dated June 30 1960 in 281 F. 2d 481, and the denial of certiorari on that issue on November 21 1960 at 364 US 901.

## Jurisdiction

The judgment of the Court of Appeals affirming in part and reversing in part the District Court and directing a second trial was entered June 7 1967 (A. 225-26).[1] Jurisdiction is invoked under 28 USC § 1254(1). The petition herein in the nature of a cross-petition was filed August 7 1967, and the writ granted October 9 1967. A petition by respondent (No. 335) was filed July 7 1967, and the writ granted also on October 9 1967. By order of that date the two petitions were consolidated for argument. The Court of Appeals' mandate has been stayed pending decision of this Court.

## Statutes Involved

The pertinent statutes are Sherman Act § 2, 26 Stat. 209 (1890), as amended 69 Stat. 282 (1955); 15 USC § 2; Clayton Act §§ 4 and 5(a), 38 Stat. 731 (1914), and 69 Stat. 283 (1955), 15 USC §§ 15 and 16(a), printed in Appendix A hereto; and the six-year Pennsylvania statute of limitations, 1 Sm. L. 76 (1713), 12 Purdon's Pa. Stats. § 31, printed in Appendix B hereto.

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[1] This form of reference is to numbered pages of the joint appendix in this case and No. 335.

## Questions Presented

In a private antitrust action under Clayton Act § 4 based on the prior decree in a Government suit pursuant to Clayton Act § 5(a) and claiming damages (to be trebled) from injury attributed to defendant's monopolization—

1. May the trial court determine the antitrust violation which plaintiff claims, by traveling outside the Government decree and drawing inferences from the auxiliary findings of the Government antitrust court where the Government decree itself found no such violation and dismissed with prejudice any such allegation?

2. If the scope of the antitrust violation adjudged in the Government antitrust decree is in dispute and is decisive of the claims in a private antitrust suit based thereon, should not the trial court upon the request of defendant have certified such point to the Government antitrust court for its guidance so as to avoid confusion and conflict after the Government antitrust court had clearly indicated that the trial court's decision was wrong?

3. Where the judgment in the Government antitrust case represented a departure from the established prior course of decision as respects defendant's machinery leasing system and determined non-predatory monopolization in 1953 by reason of an intervening change in decisional law, should the change of law incorporated in the 1953 judgment be given retroactive effect for the purposes of a private treble damage claim for the period prior to the 1953 judgment?

4. Where plaintiff shoe manufacturer and defendant shoe machinery manufacturer had over a period of fifty years dealt on a lease basis without protest or objection by plaintiff and on reasonable terms identical to those enjoyed

by all defendant's customers including plaintiff's competitors, does a cause of action arise for asserted inability to buy machinery from defendant in the absence of any demand by plaintiff to purchase?

5. Where claimed damages are based on a comparison of a putative cost of purchasing shoe machines from defendant with the actual incurred cost of leasing them, should not the computed cost of purchase take into account the cost of capital to plaintiff which would have governed plaintiff's decision whether to purchase or lease?

6. Has a lessee of shoe machinery sustained injury within the meaning of Clayton Act § 4 from a monopolization by defendant of the shoe machinery market where such lessee's entire cost of using the machinery has before suit been passed on to customers in sales yielding regular profits to plaintiff lessee?

7. Upon the assumption of a violation of the antitrust laws by virtue of defendant shoe machinery manufacturer's failure to offer for sale its machinery which was acquired by plaintiff shoe manufacturer on a lease basis only, did not the cause of action under Clayton Act § 4 accrue at the first impact of the lease-only policy on plaintiff's business about 1912 so as to perfect the bar of limitations before suit filed in 1955?

## STATEMENT OF THE CASE

### 1. The Parties and the Lease Transactions.

Plaintiff The Hanover Shoe, Inc. (herein called Hanover) is a manufacturer and distributor of shoes, not shoe machinery; defendant United Shoe Machinery Corporation (herein called United) is a manufacturer and distributor

of shoe machinery, not shoes. Hanover has engaged in the manufacture of men's shoes by the Goodyear welt process since 1899, and has distributed them through shoe stores operated by its wholly-owned subsidiary Sheppard & Myers, Inc. (245 F. Supp. at 264, A. 30-31). Until 1956 Hanover's stock was closely held by members of the Sheppard and Myers families (245 F. Supp. at 264, A. 31).

United is the successor of certain shoe machinery companies which consolidated in 1899 (245 F. Supp. at 264, A. 31). Up to January 1 1955[2] United made available its more complicated machines to Hanover and all other shoe manufacturers on lease only (245 F. Supp. at 264, A. 31-32). There were in 1951 178 United machine types on this lease-only basis, of which 58 types were utilized by Hanover on United's standard form of lease during the period covered by the complaint (1939 to 1955) (245 F. Supp. at 264, 294 n. 15; A. 32, 97). The less complicated machine types, 122 in number, United offered for purchase or lease at the customer's option, and 42 machine types were available for purchase only. The leases ran for 10-year terms initially, and for five years on renewal (245 Supp. at 264, A. 32).

At least since 1912 Hanover has been a lessee of United's shoe machinery under this system (A. 6, 11). Hanover benefited from and prospered under the United leasing system to such degree that its president Mr. Sheppard never formulated any claim of injury by the system until advised by Hanover's present counsel at the directors' meeting of September 8 1955 (Def. Ex. 32, R. 274). In the preceding period Hanover not only had used without protest United's lease-only machines but had leased instead of buying some

[2]January 1 1955 is the effective date of the decree of the United States District Court for the District of Massachusetts (Wyzanski J.) entered February 18 1953 in *U. S.* v. *United Shoe Machinery Corp.* 110 F. Supp. 295, following receipt of the mandate of this Court's affirmance, 347 US 521.

136 less important machines available for purchase at the customer's option (245 F. Supp. at 281, A. 67). On the promulgation of the Plan for Terminating Form A Leases pursuant to decree par. 9, however, Hanover in and after October 1955 purchased most of the United machines it was then using on lease, at the heavy discounts established by the Plan (245 F. Supp. at 281-82, A. 68-69).

The leasing system which was employed by all major shoe machinery manufacturers (p. 8, below), had important advantages for shoe manufacturers. The validity of the leases and the reasonableness of charges thereunder were accepted by the courts below (245 F. Supp. at 275-78; A. 57, 60-61). As the trial court found (245 F. Supp. at 280, A. 66), Hanover did not before 1955 ask to buy the lease-only machines, and did not protest its inability to buy them. The trial court also recognized (245 F. Supp. at 277, A. 58):

> "Judge Wyzanski did find there was virtually no expressed dissatisfaction from consumers respecting the leasing system, and that all shoe manufacturers who testified on the point expressed a preference for the leasing system."

Good and compelling business reasons underlay Hanover's failure to seek the right of purchase. In its beginnings as a small and struggling shoe manufacturer, it was able by leasing machines from United to work with a much smaller capital investment than if it had to buy its machinery (cf. 110 F. Supp. at 323). Even during the complaint period 1939-55, when capital was more available, tax considerations and considerations of the return required on its capital investment ("cost of capital") would have led Hanover to continue to lease even if there were an option to purchase. See pp. 52-56 below. Moreover, Hanover had, and often exercised, the right under the leases to return

worn-out or obsolete machines (A. 302-03; Def. Ex. 7-15(b), A. 628-47; Def. Ex. 73, A. 672), as return charges were always covered by the credits Hanover had accumulated on a Right of Deduction Fund voluntarily established by United out of unit charges on the leased machines (A. 301-02).

Hanover prospered under the leasing system. It earned a return on net sales well above those of Melville Shoe and other substantial competitors as well as the average of manufacturing industries generally (App. 1960 96a, 178a-79a).[3]

**2. Decree in the Government Suit.**

Hanover based its case (245 F. Supp. at 266, A. 35-36; 377 F. 2d at 780, A. 189) on the decree in *United States* v. *United Shoe Machinery Corp.* 110 F. Supp. 295 (D. Mass. 1953), aff'd *per curiam* 347 US 521. This decree found as "means whereby defendant monopolized the shoe machinery market" particular clauses of United's leases which provided for a ten-year term, a full-capacity clause, deferred payment charges, and United's rendering of repair and other service without separate charge (110 F. Supp. at 352). The decree did *not* condemn the lease-only policy. To the contrary, paragraph 2 declared in part (*ibid.*):

> "The other charges of violation of the Sherman Act set forth in the complaint are dismissed with prejudice."

Included in paragraph 61 of the complaint, which appears in the section captioned "Offenses Charged", is the following (A. 231):

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[3]This form of reference is to numbered pages of United's appendix on its 1960 petition for certiorari, denied 364 US 901.

> "61. For many years United has declined to sell most of its shoe machines and has made such machines available to shoe manufacturers only upon leases. . . ."

Thus the only "means" of monopolization set forth in the decree were leases in the particular form thereafter expressly outlawed, and the decree did not adjudicate that United's "declination" to sell violated the Sherman Act.

Judge Wyzanski in his opinion and findings provided for the parties here at bar the following frame-work of industrial history (110 F. Supp. at 340):

> "In supplying its complicated machines to shoe manufacturers, United, like its more important American competitors, has followed the practice of never selling, but only leasing. Leasing has been traditional in the shoe machinery field since the Civil War. So far as this record indicates, there is virtually no expressed dissatisfaction from consumers respecting that system; and Compo, United's principal competitor, endorses and uses it. Under the system, entry into shoe manufacture has been easy. The rates charged for all customers have been uniform. The machines supplied have performed excellently. United has, without separate charge, promptly and efficiently supplied repair service and many kinds of other service useful to shoe manufacturers. These services have been particularly important, because in the shoe manufacturing industry a whole line of production can be adversely affected, and valuable time lost, if some of the important machines go out of function, and because machine breakdowns have serious labor and consumer repercussions. The cost to the average shoe manufacturer

> of its machines and services supplied to him has been less than 2% of the wholesale price of his shoes.
>
> However, United's leases, in the context of the present shoe machinery market, have created barriers to the entry by competitors into the shoe machinery field."

Thus defendant's leasing practices operated to the detriment of its competitors by benefiting its customers—Hanover and all other lessees—in a relationship with many partnership aspects (*id.* at 344). Judge Wyzanski found that the kind of lease used by United deterred a shoe manufacturer from obtaining a competitor's machine "more than if he owned that same United Machine, *or if he held it on a short lease* carrying simple rental provisions and a reasonable charge for cancelation before the end of the term" (*id.* at 340; emphasis supplied). It was the particular form of "long-term, complicated leases" (*id.* at 343) with the indicated "exclusionary features" (*id.* at 344) that was condemned; leases as such were not abolished (*id.* at 349). United followed no predatory practices, and "probably few monopolies could produce a record so free from any taint of that kind of wrong-doing" (*id.* at 345).

Moreover, Judge Wyzanski recognized that United came into the Government suit with three decisions of this Court in its favor, stating (*id.* at 348):

> "The Supreme Court had three times, in United States v. Winslow, 227 U. S. 202, 33 S. Ct. 253, 57 L. Ed. 481, United States v. United Shoe Machinery Company of N. J., 247 U. S. 32, and United Shoe Machinery Corp. v. United States, 258 U. S. 451, 42 S. Ct. 363, 66 L. Ed. 708, reviewed aspects of this company's, or its predecessor's, activities.

> What United is now doing is similar to what it was then doing, but the activities which were similar stood uncondemned,—indeed, one ought to go further and say they were in part endorsed."

These decisions were deemed by Judge Wyzanski—properly, in our submission—a sanction of United's leasing and other business procedures up to the time of the actual decision in the Government case, and Judge Wyzanski's review of its history not only acquitted United of predatory practices but recognized its leases and leasing practices as "natural and normal, for they were, in Judge Hand's words, 'honestly industrial' " (110 F. Supp. at 344). In light of the three earlier decisions of this Court which specifically involved United and which left its activities "uncondemned" and "in part endorsed", Judge Wyzanski found that "it would be anomalous to charge the officers of United with any moral deficiency" (*id.* at 348). This Court's affirmance *per curiam*, 347 US 521, is an acceptance of these findings.

Again, in the proceedings before Judge Wyzanski ten years after the decree to determine whether it should be modified, and with full cognizance of the trial court's decision herein that he (Judge Wyzanski) had adjudicated the lease-only system to be illegal and that such determination would support an award of treble damages to Hanover as lessee (see pp.17-21 below), Judge Wyzanski repeated his understanding of the decisional history as follows:

> "Among the reasons that this Court made this choice [i.e. against dissolution] were that the Supreme Court had approved the constitution of United as a single enterprise, ***that it had permitted United to proceed with leasing as an exclusive method of distributing machines,*** that United had engaged in no

> predatory or immoral practices, and that United owed much of its position to superior products and services, to its own inventions, and to the other results of United's skill, ability, and efficiency.'" *United States* v. *United Shoe Mach. Corp.* 266 F. Supp. 328, 330 (D. Mass. 1967; emphasis supplied).

The 1953 decree directed United to offer machines for sale, on terms not substantially less advantageous than the lease terms, only "after A Day", a date which was to be six months after return of the mandate of this Court in the event of appeal (110 F. Supp. at 352). A-Day was ultimately fixed at January 1 1955. In his findings Judge Wyzanski did his best to clarify the solely prospective nature of this direction to sell by saying that it was intended "to bring United, in the future, in the same class as its competitors" (*id.* at 350).

Government counsel himself upon the argument here of the appeal from the 1953 decree took the view we now urge as to that decree's recognizing the entire propriety of the lease-only system, and so represented to this Court in connection with the affirmance in 347 US 521. Witness the following excerpts from the oral argument on April 26 and 27 1954, No. 394, October Term 1953 (Transcript at p. 87):

> "Justice Frankfurter: Did the Government take the position that wholly apart from the terms of the leasing system, leasing as such is one of the something or other unusual, unnatural barriers?
>
> Mr. Spritzer: No, indeed. We did not ask that leasing be prohibited.
>
> Justice Frankfurter: You did not?
>
> Mr. Spritzer: No.

Justice Frankfurter: So that leasing itself cannot be one of the monopoly-aiding instrumentalities?

Mr. Spritzer: It is this leasing system as practiced."

(Transcript at p. 100):

"Justice Reed: Do I understand you to contend that per se leasing is invalid?

Mr. Spritzer: No, we do not. . . ."

(Transcript at pp. 119-20):

"Justice Reed: Well, unless we are going to say that the leasing system per se is violative of the antitrust act—

Mr. Spritzer: We are not suggesting that for a moment.

Justice Frankfurter: We cannot say that under this decree, can we?

Mr. Spritzer: No, and the Government has never suggested that the District Court or this Court should say it."[4]

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[4]This recognition of the effect of the adjudication in 110 F. Supp. 295 as accepting the complete propriety (up to 1955) of the lease-only system and absence of sale is not impaired, we submit, by the fact that United as appellant suggested that Judge Wyzanski had treated his decision as more sweeping. At p. 170 of its brief in this Court in No. 394 October Term 1953 United said that Judge Wyzanski "evidently" regarded the failure to sell the leased machines as "the basic objection to the system". The interrogation of Government counsel by Justices Frankfurter and Reed was presumably addressed to this theory of the decision below. Government counsel rejected it, and the affirmance is an acceptance of the contrary view that the leasing system *per se* was not held by the decision then under review to be a violation of the antitrust laws.

### 3. Treble Damage Litigation Arising Out of the Government Decree.

While Government antitrust decrees usually induce a flood of private actions, frequently at the instance of "a very strange class of private attorneys general",[5] the landmark decision of Judge Wyzanski has left in its train only the case at bar as sole collateral surviving. Out of ten suits filed, five were brought by the competitors presumptively injured by the monopoly found.[6] Three suits by affiliated plaintiff lessees were dismissed with prejudice for non-prosecution after partial summary judgment for defendant. *Muskin Shoe Co., Riverside Shoe Corp.*, and *Oriole Shoe Co.* v. *United Shoe Mach. Corp.* D. Md. Civ. 9717, 9718, 9719, 167 F. Supp 106 (1958), dismissed by order dated January 4 1963. The fourth was dismissed on the merits after trial. *W. B. Coon Co.* v. *United Shoe Mach. Corp.* W.D.N.Y. Civil No. 6841, dismissed April 12 1963 (see A. 267-73). The fifth is the case at bar.

Thus out of the 1,462 shoe manufacturing enterprises found to have existed in 1947 (110 F. Supp. at 301), only five sought to use the decree so as to claim injury from the monopolization found, and only Hanover's suit has survived to bring into this Court enormous pretentions of "damage" from the retroactive application of altered de-

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[5]This phrase from *Kelly* v. *Kosuga* 358 US 516, 520, is appropriate to the case of the plaintiff-respondent at bar which enjoyed for so many years the benefits of, and prospered exceedingly under, the leasing system it has now attacked.

[6]*Compo Shoe Machinery Corp.* v. *United Shoe Mach. Corp.* D. Mass. Civ. 54-472-M, dismissed on settlement February 25 1957; *Allied Shoe Machinery Co.* v. *United Shoe Mach. Corp.* D. Mass. Civ. 54-815-M, dismissed on settlement November 20 1957; *Herman Schwabe, Inc.* v. *United Shoe Mach. Corp.* dismissed on plaintiff's case 297 F.2d 906 (CA 2 1962), cert. den. 369 US 865; *International Shoe Mach. Corp.* v. *United Shoe Mach. Corp.* jury verdict for defendant 315 F.2d 449 (CA 1 1963), cert. den. 375 US 820; *Rapid Shoe Machine Mfg. Co.* v. *United Shoe Mach. Corp.* SDNY Civ. 104-158, dismissed on plaintiff's case December 16 1959.

cisional rules and the belated substitution of a fictive purchase for the leasing relationship theretofore happily accepted (p. 16 below).

This paucity of complaints from the class of lessees, gratuitously called by the trial court "captive" (245 F. Supp. at 280, A. 66), corresponds to the eminent satisfaction which all the shoe-maker witnesses expressed with United's leasing system in their evidence in the Government case. This testimony was unanimous, and Judge Wyzanski's findings noted the preference of customers to lease rather than buy their shoe machinery (110 F. Supp. at 323, 340). The record before this Court in No. 394, October Term, 1953 contained the evidence of a dozen witnesses to that effect.[7]

**4. Hanover's Case.**

This suit for treble damages was filed September 21 1955. Hanover laid its case on Judge Wyzanski's decree in the Government suit above described (A. 35-6). Its complaint charged United with monopolization of the shoe machinery industry since 1912 and claimed damages from (i) excessive lease charges and (ii) inability to acquire shoe machinery by purchase (A. 11-12, 18-19). Hanover

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[7]See the following testimony of shoe manufacturers in the record in No. 394 October 1953: D. J. Matthews Tr. 4580-1, 4603; W. J. McGrath Tr. 4835-6; R. W. Schiff Tr. 4980-1, 4994-5; S. B. Vaisey Tr. 5024-7, 5055-7; P. O. MacBride Tr. 5156-8; S. Shain Tr. 5188-90, 5202; L. Feman Tr. 5291-2; C. Onkgiesen Tr. 5347-8, 5357-8; D. E. Goldstrom Tr. 5428-30, 5433-4; L. E. Beaudin Tr. 5500-1; W. M. Jarman Tr. 5643-5, 5677-8, 5681-2; J. L. Moran Tr. 5749-51; R. D. Jackson Tr. 5795, 5799-800, 5815; A. Bartschi Tr. 4879-85, 4900. Mr. Jarman (General Shoe Corporation, now Genesco) thought leasing was preferable for the industry as a whole, that a right of purchase would possibly be better for the larger companies, but that the difference was not great. J. F. Wogan, United's General Manager who had been with it since 1904, never heard any shoe manufacturer express opposition to the leasing system (Tr. 9502, 10501-3). Hanover's president L. B. Sheppard had no objection whatever to it except that it promoted too much competition in the shoe manufacturing business (statement in 1950, A. 341).

had dealt with United on a lease basis continually since its organization and the violation alleged is dated in the Hanover complaint as beginning in and before the year 1912 (A. 11).

(a) *Passing-On Trial Before Goodrich, J.* By consent order dated April 1 1957 a preliminary trial was held before the late Hon. John W. Murphy, Chief Judge of the Middle District, on the question whether the excessive shoe machinery costs alleged by Hanover (and denied by United) to have resulted from the leases were an injury to Hanover's business or property where such costs were passed on to Hanover's customers in the price of shoes. This claim of excessive charges was presented in the framework of the leases; that is, as excessive rental, unit and other charges for products and services (App. 1960 25a-26a).

This preliminary issue was tried before Judge Murphy without a jury from April to June 1957. When that Judge delayed in deciding the issue, Hon. Herbert F. Goodrich, a judge of the United States Court of Appeals for the Third Circuit, was designated by Chief Judge Biggs in his place, and on February 12 1960 he rendered his judgment and decision holding that it was irrelevant whether or not excessive charges had been passed on and thus not absorbed by Hanover to its injury (185 F. Supp. 826). That decision was affirmed by the Court of Appeals 281 F. 2d 481 and certiorari was denied 364 US 901.

Judge Goodrich made his determination on the law only without findings of fact and in his decision followed the framework of the parties' argument in terms of excessive lease expense. He considered plaintiff's complaint as one for having been caused "to pay excessive rentals for the lease of shoe machinery" (185 F. Supp. at 828). He paraphrased plaintiff's argument in terms of "excessive rental fees we have paid to defendant". Pursuant to the April 1957 order he assumed that "defendant was guilty of a violation of law and did charge plaintiff an excessive price

for the lease of the machinery". On this assumption he held that "plaintiff's injury occurred when it was charged too much for the machinery" because it could have used the margin for other purposes (*id.* at 829).

(b) *Plenary Trial Before Sheridan, J.* At the trial before Judge Sheridan, which commenced in October 1962, Hanover embarked upon an entirely different theory of damages. While still urging that the lease charges were in themselves excessive, Hanover also presented three calculations prepared by S. D. Leidesdorf & Co., certified public accountants, which compared the total of rents and unit charges paid by Hanover in the period 1939-55 with a wholly new and artificial figure constructed for the purpose; that is, a putative *purchase price* of leased machinery calculated by Leidesdorf on assumptions provided by Hanover's counsel. Thus, in 1962 for the first time Hanover tried to establish damages by totalling the payments it made over 16 years for certain United machinery and then setting off against that total an assumed purchase price for the same machines on the theory that they *should have been offered for sale* in 1939-55 and that Hanover *would have bought* every one of them (245 F. Supp. at 287, A. 81).

This was a theory which had never come before Judge Goodrich, the Court of Appeals, or this Court in connection with the earlier passing-on question.

On the basis of the Wyzanski decree Judge Sheridan rejected Hanover's claim that the leasing charges were excessive because the Government decree, "on which Hanover relied, had made no finding that United's leasing charges were excessive". (377 F. 2d at 780, A. 189). But Judge Sheridan held that the Wyzanski decree and findings in 1953 were *prima facie* evidence under Clayton Act § 5(a) that United had in the past violated the antitrust laws by not offering its machines for sale, since the court said that Judge Wyzanski had found the leasing

system and lease clauses enabled United to monopolize the shoe machinery market and had decreed that in the future the machines should be offered for sale as well (245 F. Supp. at 277, A. 59). Damages were predicated by Judge Sheridan upon comparison with an assumed purchase price for the machines leased, with the finding merely that Hanover "likely would have purchased" the machines (245 F. Supp. at 280, 287; A. 66, 81).

On this basis judgment was given Hanover for $4,239,609 with interest, and $650,000 attorneys' fees in addition (A. 180). The theory of damage was that the difference between the aggregate lease charges for the machines in question during the damage period—*even though reasonable as lease charges*—and the price which the court calculated Hanover would have paid for the machines—*if* they had been offered for sale pursuant to the duty inferred from the Wyzanski decree and *if* Hanover had chosen to buy them—could be imputed to defendant as a wrong. This amount was $1,413,203 (245 F. Supp. at 302, A. 166) which was then trebled in the judgment.

(c) *Hearing Before Wyzanski, J., and Refusal of Sheridan, J. to Certify Questions.* Because it seemed clear from the face of the Government decree that United's prior failure to sell machines had not been held by Judge Wyzanski to be illegal and because the decree had been consistently so interpreted by all courts construing it, no need to seek a construction from Judge Wyzanski arose until Judge Sheridan's opinion was rendered herein on April 29 1965 (A. 27-107). Thereafter, notice of application by United to Judge Wyzanski for a construction of his decree was given May 21 1965, a hearing was held before that Judge May 28 at which for reasons of comity he refrained from formal action unless there were to be a certification from Judge Sheridan (A. 123-50), and the record on that appli-

cation together with a motion by United for partial new trial and for such certification was filed with Judge Sheridan June 9 (A. 108-10). All this occurred well before entry of judgment on August 13 1965.

The requested certification was denied by Judge Sheridan and the Court of Appeals has upheld the denial, notwithstanding the latter court's recognition that (377 F.2d at 790, A. 209-10)—

> "The obvious economy in judicial effort which would follow from such a practice [certifying the questions to Judge Wyzanski], especially in a case as protracted as the Government suit against United, speaks strongly in its favor.
>
> . . . . .
>
> United contends with much force that Judge Wyzanski plainly indicated at the hearing his informal interpretation of the decree contrary to that of the court below."

Solely on the basis of supposed "untimeliness" the Court of Appeals concluded that it "need not determine this interesting question", citing *United States Gypsum Co.* v. *National Gypsum Co.* 352 US 457.

At the hearing before Judge Wyzanski on May 28 1965, attended by counsel for all parties including the Government, counsel for United made the following submissions (A. 125):

> "That case [the Government action] accused the defendant of monopolization, which is to say wrongful exclusion of its competitors, shoe machinery manufacturers; and that, therefore, in your Honor's determination, as affirmed by the Supreme Court, there is primarily the element of prospective action,

correction of what your Honor held to be a wrong or illegal business situation; and that at no time, express or latent in the record and decision was there a holding of a duty on the part of United to sell its machinery to its lessees before 1953 or 1955."

After describing the *Hanover* and *Coon* treble damage suits, United counsel continued (A. 126):

"Now this [Coon] decision, which was rendered April 12, 1963, was called to the attention of Judge Sheridan, and it came down just before the oral argument in the Hanover case, which was May 2, 1963, and thus two years before the decision was filed. When the decision was filed, this was the first indication we had that a Federal Judge would take seriously the contention that your Honor's decree implied or perhaps determined a pre-1955 duty and obligation to sell."

On Government counsel resisting United's application, Judge Wyzanski had the following colloquy with Government counsel (A. 141-44):

"The Court: Miss Brass, I have some questions to put to you. First of all, I want to say I am always glad to see you personally here and I am also glad to have the Department of Justice here more particularly since this is a case in which the United States is very definitely a party to the original proceedings and obviously concerned about any matter of a possible modification of a Decree.

Miss Brass: Yes, your Honor.

The Court: But, I take it for granted, that the Department of Justice remains true to what it de-

scribes on the walls of its buildings with respect to its interest in having justice done as distinguished from merely prevailing. And I suppose you have no more doubt than Mr. Carson has as to what was my intention when I entered the Decree. Have you any doubt?

Miss Brass: We have no doubt, your Honor, at all.

The Court: Have you thought it fit to tell Judge Sheridan that you have no more doubt than Mr. Carson about what the whole nature of the proceeding was?

Miss Brass: Your Honor, until we received this application a few days ago, we had no reason to assume that this issue was even going to arise. We had no notice whatsoever that this was going to be filed before your Honor. There has been no occasion for us to appear before Judge Sheridan.

The Court: But don't you think Judge Sheridan might wrongly misconstrue your appearance here by assuming that you thought that Mr. Carson was mistaken on his ultimate point as to how I looked at the matter when I decided it?

. . . . . .

Now that you are here, are you not aware from being here on previous occasions that the government never contended, and I never ruled, as Judge Sheridan supposes the matter was decided? Are you not aware of that?

Miss Brass: Well, your Honor——

The Court: I ask you as a lawyer, on your honor as a lawyer.

Miss Brass: Your Honor, I do not read the Court's decision as being different or being opposed to what Judge Sheridan has ruled.

The Court: Is that your testimony as a lawyer, Miss Brass?

Miss Brass: Your Honor—

The Court: Is that your testimony as a lawyer, that you would like to stand on before me, as being your best legal opinion?

Miss Brass: Well your Honor—

The Court: I am just asking you, and I will hold it as a statement of your character as well as your competence.

. . . . .

The Court: No one who knows me will misunderstand the nature of my questions and comments even if on the jurisdictional ground I find it inappropriate to give the relief asked."

Counsel for Hanover contended that Judge Sheridan had decided correctly and that, if there were error, the proper remedy would be review by the Third Circuit Court of Appeals (A. 145-6). Judge Wyzanski then ruled that he should not intrude his views unless there were a certification from his fellow judge (A. 148-50), clearly indicating a willingness to certify his opinion upon request in the manner in which "the Supreme Court encourages Federal Courts to act with regard to State matters" (A. 138).

(d) *Court of Appeals Decision.* On appeals by both parties the Court of Appeals vacated the judgment and directed a new trial. The court recognized "the extraordinary position of United in regard to the antitrust laws", referring to "the approval of its leasing policy in various forms by three successive decisions of the Supreme Court"

and characterizing United's conduct as "manifestly pursued in the shelter of Supreme Court approval" (377 F.2d at 788, A. 206). The Court agreed in part with United's claim that the decree adverse to it in the Government antitrust suit should not be retroactively applied, by holding that United was justified in its business practices with respect to the leasing of shoe machinery up to the date in 1946 when this Court approved Judge Learned Hand's decision in the *Alcoa* case (*American Tobacco Co.* v. *United States* 328 US 781, 811-15). The court confined damages to the period commencing at that time and held that the damage period should end, not at the date of filing of the complaint, but on June 1 1955 when conversion from leasing to ownership of the United machines first became possible as an alternative by reason of Judge Wyzanski's approval of the appropriate plan under the 1953 decree.

The Court of Appeals also reversed Judge Sheridan for his failure to take into account the tax advantages of leasing for the purpose of comparing the hypothetical ownership cost with lease cost. On Hanover's appeal from the exclusion of one of United's machines from the damage calculation by virtue of the availability of comparable outside machines, the Court of Appeals remitted this item for reconsideration by Judge Sheridan in view of the shortening of the damage period directed. Finally, the court remanded the award of $650,000 attorneys' fees for reconsideration inasmuch as they had been based in part on the amount of the recovery.

## SUMMARY OF ARGUMENT

For more than 50 years United dealt with Hanover and all other customers in the manner traditional in the industry and universally accepted by offering certain types of shoe machinery for lease only. United's lease-only policy

was early in the century endorsed by this Court. Hanover thrived under the leasing system and at no time protested it or demanded that United offer the machines for sale. In 1953 the Massachusetts District Court held that United had monopolized the industry in violation of Sherman Act § 2 by "means" of certain restrictive clauses in its leases and directed United in the future to eliminate such clauses and also to offer its machines for sale as well as for lease. This Court affirmed.

Of the private antitrust suits ensuing on the derivative basis afforded by Clayton Act § 5(a), the case at bar is the only one which has produced for the claimant—to all appearances a satisfied customer like a thousand other lessees throughout the term of the Government case—an award of damages enormous in size on theories offensive to the common sense of justice.

(1) The courts below erroneously read into the Government decree a determination that United's lease-only policy had itself been illegal in the years prior to the effective date of the decree. That determination was indispensable to any recovery by Hanover. The lease charges themselves having been held reasonable, injury to Hanover could be derived only from findings that United had a duty to sell, that Hanover would have bought, and that the cost of purchase would have been less than the lease cost. The trial court found in the Government decree condemnation by Judge Wyzanski of the lease-only policy itself notwithstanding that ——

(a) the decree in par. 4 specified the only illegal "means" of monopolization as being four particular clauses in the leases;

(b) the decree pointedly omitted any declaration that United's policy of leasing machines but not offer-

ing them for sale was in itself a means of monopolization;

(c) the decree dismissed "with prejudice" the Government's charge that "United has declined to sell most of its shoe machines and has made such machines available to shoe manufacturers only upon leases";

(d) the whole thrust of the supporting findings in the Government suit shows that the four restrictive clauses, and not the lease-only policy alone, were held to be means of monopolization;

(e) Government counsel expressly represented to this Court on the argument of United's appeal from the decree in 1954 that "the Government has never suggested that the District Court or this Court should say" that the lease-only policy was itself unlawful;

(f) this Court had earlier passed on and approved under Sherman Act § 2 United's leasing policy, which led the District Court in the Government suit to conclude that United's activities "stood uncondemned";

(g) after the decision of the trial court herein (Sheridan, J.) and before entry of its judgment United sought a construction of the decree from the District Judge who entered it (Wyzanski J.), and the latter made it clear that the decree did not mean what Judge Sheridan (and now the Court of Appeals) thought it did, stating "the government never contended, and I never ruled, as Judge Sheridan supposed the matter was decided"; and

(h) all other courts confronted with the question whether the Wyzanski decree found lease-only itself

to constitute an antitrust violation have held that it did not.

(2) On the assumption that lease-only had been held unlawful the decree and supporting findings show that the exclusionary impact of the lease clauses found restrictive was not on United's customers in the *shoe manufacturing* industry, where complete freedom of market entry was found to exist, but on United's competitors in the *shoe machinery manufacturing* industry. Thus, the alleged injury to Hanover was not entitled to the benefit of the estoppel created by Clayton Act § 5(a).

(3) Even if the decree in the Government suit had adjudicated that United's lease-only policy was itself an antitrust violation *vis-a-vis* lessee customers, it would be flagrant injustice to accord such an adjudication retroactive estoppel effect under Clayton Act § 5(a). United was entitled to rely on this Court's prior approval of the lease-only policy unless or until that approval was withdrawn. Nothing in the *Alcoa* and *American Tobacco* decisions in 1945 and 1946 made lease-only an antitrust violation as a general proposition, and certainly not where United's lease-only policy had prior approval by this Court. The very fabric of decisional law and function of settled rules as a guide to business conduct justified United and its counsel in relying on the pattern of approval exemplified in the chain of cases which had previously brought United's practices before the Federal courts. Repeal of that approval with retrospective force and application *ex post facto* of a contrary rule first declared in 1953 is shocking to the sense of justice and inimical to sound judicial administration of an antitrust policy intended to guide business conduct. Particularly unfair is such a result where penal consequences in the form of three-fold damages are attached

to acts erected into an antitrust offense by innovations of decisional law.

(4) Further error was committed by the courts holding that if the machines had been offered for sale before 1953 Hanover would have bought them. Hanover's own calculations on which it based its 1955 decisions whether to buy United's machines pursuant to the option first conferred by the decree or to continue to lease as in the past, demonstrate that before 1953 Hanover would not have bought the machines leased, just as in fact it made no request to buy. Hanover acquiesced in the lease-only system, which in the shoe machinery industry was customary and traditional and under which Hanover prospered.

(5) Hanover is precluded also by its failure to make any protest or demand regarding United's failure to offer for sale machines which Hanover leased. Any defendant, before being saddled with huge damages on a penal theory for antitrust violation and injury to a claimant, is entitled to be put on notice as to the nature of the supposed violation and the identity of the party claiming injury and to be given the opportunity to correct its ways. This is a matter not only of elementary fairness but of sound policy in law enforcement. If *Alcoa* and *American Tobacco* were clear enough to apprise United's counsel that its lease-only policy now constituted a violation of Sherman Act § 2, certainly a demand by Hanover after *American Tobacco* that United mend its ways cannot be presumed to be "futile".

(6) By Hanover's own post-decree calculations cost of capital considerations would have dissuaded Hanover from purchasing prior to the decree, and the lower court's refusal to recognize cost of capital as a factor in the comparison of lease cost with putative purchase price was error. In any

event, even if lease cost had exceeded purchase price, any excess was not absorbed by Hanover but became part of its own sales price and was automatically recouped.

(7) The antitrust violation found below was, if it existed at all, the lease-only policy adopted and applied over a period of long duration. If it is to be held an antitrust offense on a retroactive basis, then the invasion of Hanover's legal right thereby occurred when the lease relations commenced, in 1912 or earlier. Right of action accrued in 1912 at the latest, and suit in 1955 was barred by limitations. That bar may not be avoided simply by reference to the entry into new leases and the repeated collection of lease rentals, since the leases were held valid and the rentals held reasonable by the courts below. The wrong found was the policy of not offering machines for sale, a policy which remained unchanged from 1899 to 1955.

## ARGUMENT

### I. THE COURT BELOW ERRED BY INTERPRETING THE GOVERNMENT DECREE AS A DETERMINATION THAT UNITED'S PRACTICE TO LEASE RATHER THAN TO SELL WAS UNLAWFUL.

#### A. The decree in the Government suit makes it clear that United's lease-only policy was not held to be a means of monopolization.

In order to establish that United's pre-1955 lease-only policy was in itself monopolization, Hanover relies solely upon the Government decree, which is made *prima facie* evidence in this case by Clayton Act § 5(a), 38 Stat. 731 (1914), 15 USC § 16(a). Essential to the recovery allowed by the courts below is the finding that the decree constituted an adjudication that prior to the decree leasing as

such by United was an anti-trust violation and hence United was obligated also to offer the machines for sale. The lease charges themselves were held reasonable in amount, so that unless leasing as such were held by the decree *to have been* illegal, United would have had no duty to offer the machines for sale and the very foundation on which plaintiff raised its hypothetical structure of damage would crumble.

The Wyzanski decree, after stating in par. 2 the general conclusion that United had monopolized the shoe machinery trade, identified the four exclusionary lease clauses or practices which it held to constitute monopolization:

> "4. All leases made by defendant which include either a ten-year term, or a full capacity clause, or deferred payment charges, and all leases under which during the life of the leases defendant has rendered repair and other service without making them subject to separate, segregated charges, are declared to have been means whereby defendant monopolized the shoe machinery market." 110 F. Supp. at 352.

If Judge Wyzanski had intended to hold that United's lease-only policy itself constituted monopolization, his well-known facility of phrase would have left the point in no doubt. Par. 4 of the decree would then have read to the following effect:

> "4. Defendant's policy of leasing machines but not offering them for sale is declared to have been the means whereby defendant monopolized the shoe machinery market."

*But this is not what Judge Wyzanski decided.* He not only phrased his decree to exclude any such holding, but in par. 2 thereof he specifically dismissed *with prejudice* "the other charges of violation of the Sherman Act set forth in the [Government] complaint".

As drawn, that complaint seemed to include in its sweep a claim that the lease-only policy was wrongful, apart from the specific clauses identified as exclusionary by themselves. Par. 61 of the complaint under "Offenses Charged" introduced a four-paragraph section dealing with "United's leasing policy" by stating (A. 231):

> "For many years United has declined to sell most of its shoe machines and has made such machines available to shoe manufacturers only upon leases. . . ."

If this par. 61 did in fact charge that United's lease-only policy constituted monopolization, it was dismissed with prejudice by par. 2 of the decree. Such determination is the precise opposite of what Judge Sheridan and the Court of Appeals held Judge Wyzanski to have done, as the predicate for the damage award to Hanover.

**B. If the decree were unclear, the opinion and findings of the district court and contentions of the parties show conclusively that United's lease-only policy was not held to constitute monopolization.**

The Court of Appeals conceded that "on the face of the decree . . . United's contention [that lease-only was not held a violation] is not lacking in merit", 377 F. 2d at 784, A. 197. However, that court inferred from a lengthy examination of "the elaborate findings of fact and opinion of Judge Wyzanski", 377 F. 2d at 785, A. 198, that United's lease-only policy was condemned as a means of monopolization.

We submit that here the Court of Appeals committed manifest error. Judge Wyzanski's opinion states in a half dozen places that the exclusionary practices which he

condemned were the four assertedly restrictive lease clauses. For example, the Summary at the outset of the opinion states:

> "In the leases have been provisions such as the 10-year rental term, the full capacity clause, and the deferred payment charges, which, as written and applied, have adversely affected actual or potential competition in the shoe machinery market." 110 F. Supp. at 297.

Again, in summarizing the exclusionary impact which he found United's leases to have, Judge Wyzanski wrote:

> "[A shoe manufacturer] is deterred [from replacing a United machine by a competing machine] more than if he owned that same United machine, or if he held it on a short lease carrying simple rental provisions and a reasonable charge for cancelation before the end of the term." *Id.* at 340.

By contrast, the opinion nowhere states or even implies that United's lease-only policy was a means of monopolization. See 110 F. Supp. at 297, 319, 323-25, 343-44.

The Court of Appeals based its inference that Judge Wyzanski held United's lease-only practice to be a violation on two grounds. First, the court observed that Judge Wyzanski's decree ordered United in the future to offer any machine for sale as well as lease on terms which "do not make it substantially more advantageous for a shoe factory to lease rather than to buy a machine", 110 F. Supp. at 352. But Judge Wyzanski made it clear in his Opinion on Remedy that his purpose in directing United to sell as well as to lease was "gradually [to] weaken the prohibited market power which [United] now exercises", *id.* at 350. Similarly, he seriously considered forbidding United to lease

machines, *id.* at 349, although it was not contended at bar that the mere existence of leasing constituted monopolization. In both instances, Judge Wyzanski was following the admonition of this Court that often "relief, to be effective, must go beyond the narrow limits of the proven violation." *United States* v. *United States Gypsum Co.* 340 US 76, 90.[8] The apparent assumption of the courts below that what Judge Wyzanski prohibited for the future he must have condemned for the past is therefore completely fallacious.

The other ground for the Court of Appeals' inference that Judge Wyzanski had held United's lease-only policy to be a violation was that in the midst of his extensive findings of fact he touched upon two aspects of United's leases other than the four assertedly exclusionary clauses which he found made competition with United more difficult. He found that "some manufacturers" would be readier, by reason of "financial and psychological considerations", to buy a competing machine if they had bought rather than leased a United machine, 110 F. Supp. at 324, and that the lease-only policy, by preventing the formation of a second-hand market in United machines, relieved United from the competition of second-hand machines and made United's machines more difficult for a competitor to copy, *id.* at 325.

These observations, however, do not support the deduction of the court below that the lease-only policy, as distinguished from the four allegedly exclusionary clauses,

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[8]Accord, *United States* v. *Loew's Inc.* 371 US 38, 53; *United States Gypsum Co.* v. *National Gypsum Co.* 352 US 457, 472; *Schine Chain Theatres, Inc.* v. *United States* 334 US 110, 128-29; *International Salt Co., Inc.* v. *United States* 332 US 392, 400; *United States* v. *Bausch & Lomb Optical Co.* 321 US 707, 724; *Ethyl Gasoline Corp.* v. *United States* 309 US 436, 461; cf. *FTC* v. *National Lead Co.* 352 US 419, 430.

was condemned. They serve to support, and were undoubtedly intended to support, the remedial aspects of the decree. The opinion gives no indication that Judge Wyzanski would have found these two aspects of United's leases sufficiently restrictive to justify the condemnation of monopolization. There was no evidence in the record before Judge Wyzanski to indicate the impact of these two aspects in the absence of the four clauses found to be exclusionary. In fact, although the Government contended in par. 83 of its complaint that United had attempted to prevent the growth of a second-hand market for its machines by, among other things, "insist[ing] upon the return to it of all leased machinery when shoe manufacturers have discontinued its use", the Government did not attempt to substantiate this charge or to establish its impact when it presented its proposed findings of fact following the trial. See Plaintiff's Requests for Findings of Fact and Conclusions of Law, 453-57, 629-30. Thus Judge Wyzanski's references to the psychological impact of leasing and to the role of a second-hand market do not support the conclusion of the Court of Appeals that he held United's lease-only policy to be monopolization.

The error of that court is further shown by the fact that no other court has so interpreted the decree. The Western District of New York reached the opposite conclusion in the only other shoe manufacturer's treble damage action based on the Government decree to come to adjudication, holding that lease-only was not itself adjudged a violation by the decree. *W. B. Coon Co.* v. *United Shoe Mach. Corp.* Civ. No. 6841, WDNY April 12 1963 (A. 267-73). And all other courts which have examined the point have concluded that Judge Wyzanski did not hold that United's lease-only policy constituted monopolization. In *Cole* v. *Hughes Tool Company* 215 F. 2d 924, 932 (CA

10 1954), cert. denied 348 US 927, the Court of Appeals stated:

> "In United States v. United Shoe Machinery Corp., D. C. Mass., 110 F. Supp. 295, 316, which involved leases of shoe machinery, the court did not condemn leasing as a practice or the requirement that the leased device be returned to the lessor at the termination of the lease period. What it did condemn was the length of the lease term and certain restrictive provisions in the lease involved in that case."

To the same effect is *Laitram Corp.* v. *King Crab, Inc.* 244 F. Supp. 9, 18, modified on another ground 245 F. Supp. 1019 (D. Alaska 1965); cf. *Fruit Mach. Co.* v. *F. M. Ball & Co.* 118 Cal. App. 2d 748, 258 P. 2d 852 (Dist. Ct. App. 1953). Moreover, when the decree was appealed in 1954 to this Court, counsel for the Government made it clear in response to questioning by the Court that he did not contend that lease-only constituted monopolization (see pp. 11-12 above). The lower courts' holding to the contrary is plain error which requires correction here.

**C. If any doubt remained that Judge Wyzanski did not hold United's lease-only policy to be monopolization, this question should have been certified to Judge Wyzanski, and refusal to certify was an abuse of discretion.**

Immediately after the trial court in this action filed its opinion holding that Judge Wyzanski had in 1953 condemned United's lease-only policy as monopolization, United applied to Judge Wyzanski for a construction of his decree. While Judge Wyzanski denied the application (A. 148-50), he indicated his willingness to certify his opinion upon re-

quest in the manner encouraged by this Court for certification of questions by Federal to State courts (A. 138), and clearly implied that the trial court had misconstrued his decree by stating to Government counsel:

> "Now that you are here, are you not aware from being here on previous occasions that the government never contended, and I never ruled, as Judge Sheridan supposes the matter was decided?" (A. 142; see excerpts at pp. 19-21 above).

United then applied to the trial court to certify this question to Judge Wyzanski. The trial court refused to do so, holding that United's request was untimely, 245 F. Supp. at 305-08, A. 173-78, and the Court of Appeals affirmed on this ground, although it felt constrained in so doing to recognize "the obvious economy in judicial effort which would follow from such a practice, especially in a case as protracted as the Government suit against United", 377 F. 2d at 790, A. 209.

The refusal of the courts below to certify to Judge Wyzanski the pivotal question whether his decree held lease-only to be an antitrust violation is in square conflict with the reasons underlying this Court's holding in *United States Gypsum Co.* v. *National Gypsum Co.* 352 US 457, 463-64. In that case United States Gypsum, after certain price-fixing clauses of its patent licenses had been enjoined in a Government suit in the United States District Court for the District of Columbia, brought actions against two licensees for royalties or other payment for the use of its patents in the Northern District of Iowa. The District of Columbia court, upon the application of the licensees, enjoined prosecution of the Iowa actions, going on to hold that the decree barred United States Gypsum from recovering royalties or other compensation. This Court affirmed

the District of Columbia court's exercise of jurisdiction, holding that the questions presented to it

> "were . . . issues peculiarly within the province of the antitrust court, whose determination would avoid multiple litigation and possibly conflicting decisions on that issue among the courts in which Gypsum had brought suit." 352 US at 464.

These reasons apply with even greater force in this case. Judge Wyzanski's decree in the Government suit, made *prima facie* evidence in treble damage actions by Clayton Act § 5(a), has been construed in a diametrically opposite manner by the courts below and by the Western District of New York in another treble damage action brought against United, identical except for plaintiffs and amounts, *W. B. Coon Co.* v. *United Shoe Mach. Corp.* Civ. No. 6841, April 12 1963 (A. 252-66). Unless such an issue is certified to the district judge who rendered the decree in the Government suit, such a patently unjustified conflict in result can be corrected only by this Court on certiorari.

The lower courts' refusal to certify the lease-only issue to Judge Wyzanski also conflicts with this Court's practice of certifying to State courts empowered to receive such certification, controlling questions of State law that are not resolved by precise State precedents. See *Aldrich* v. *Aldrich* 375 US 75 and 249; *Dresner* v. *City of Tallahassee* 375 US 136; *Clay* v. *Sun Ins. Office Ltd.* 363 US 207, 212; *England* v. *Louisiana State Bd. of Medical Examiners* 375 US 411, 433-34 (Douglas J. concurring). Such certification has recently been strongly endorsed by the American Law Institute. American Law Institute, *Study of the Division of Jurisdiction Between State and Federal Courts* 167 (Tent. Draft No. 5, 1967). The two situations are on a parity. Just as State courts have a unique familiarity with

and responsibility for the development of State law, the district judge who decided the Government suit is uniquely familiar with the massive record in that suit and bears a special responsibility for the effective and equitable working of the decree.

In light of the controlling considerations of justice and judicial economy favoring certification, the lower court's refusal to certify on the ground of untimeliness was a clear abuse of discretion.[9] In fact, strong reasons of judicial economy suggest that certification should normally be allowed only after a conflict between courts in the interpretation of the decree in a Government suit has arisen, and it has been argued for similar reasons that Federal-State certification should be limited to Federal appellate courts. American Law Institute, *Study of the Division of Jurisdiction Between State and Federal Courts* 168-69 (Tent. Draft No. 5, 1967); Comment, *Abstention and Certification in Diversity Suits*, 73 Yale L. J. 850, 869-70 (1964).

The basic objection to earlier certification is that a real need for certification may never arise. In this case, for example, Hanover might not have relied solely upon the decree in attempting to prove monopolization. Moreover, until the decision of the trial court in this case, every court which had passed upon the issue had held that Judge Wyzanski did not condemn United's lease-only policy as monopolization; if the trial court had agreed, as United had every reason to believe that it would, there would have

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[9]Hanover has nowhere argued that Judge Wyzanski would not have jurisdiction to decide the question thus certified to him, and it is clear that he would have jurisdiction, having in his decree reserved jurisdiction to make "such further orders and directions as may be appropriate for the correction, construction, or carrying out of this Decree," 110 F. Supp. at 354. See *United States Gypsum Co.* v. *National Gypsum Co.* 352 US 457, 463-64.

been no conflict between courts and no need for certification. The trial court might also have ruled against Hanover on other issues, most of which we urge before this Court, which would have required dismissal of the action. Finally, waiting until after a conflict between courts has materialized before certifying it ensures that all potential plaintiffs who would be affected by an authoritative construction of the decree are by the conflicting decisions made aware of their stake in the issue before any such construction is undertaken.

For these reasons, while we do not contend that it would be an abuse of discretion to certify a question of interpretation to the judge who decided the Government suit before any conflict in interpretation has developed, we do urge that the considerations in favor of withholding certification until a clear conflict between courts has become apparent are so weighty that the court below abused its discretion in holding that an application for certification then made was untimely.[10]

We add that to base a decision of such moment upon "untimeliness" of the application to certify—a mere matter of six weeks during which United sought a formal construction of the decree by Judge Wyaznski—seems peculiarly inappropriate in a case ten years old at the time, where the first district judge was unable to decide a preliminary issue in two and one-half years and the

[10]The trial court in attempted justification of its refusal to certify the lease-only question to Judge Wyzanski relied heavily upon *American Securit Co.* v. *Shatterproof Glass Corp.* 268 F. 2d 769, 778 (CA 3 1959), cert. denied 361 US 902, in which an alternative ground for the Third Circuit's decision rested upon a construction of an antitrust consent decree contrary to that of the court in which it was entered. That case is clearly distinguishable from the present one, involving not a consent decree but one entered after a protracted trial in the Government suit. To the extent that it is not distinguishable, however, we urge that it too was wrongly decided by the court below.

second district judge required two years after trial to file his decision on the merits. So bitter and so costly an irony does not reflect credit on the administration of justice.

**D. Clayton Act § 5(a) limits *prima facie* status to findings made expressly or by necessary implication in the Government case, so that it was error for the courts below to make lease-only a violation by inference.**

By the terms of Clayton Act § 5(a), on which Hanover rests its claim that lease-only constituted monopolization, the decree in the Government suit is *prima facie* evidence against United in this action "as to all matters respecting which said . . . decree would be an estoppel as between [the Government and United]."

This Court held in *Emich Motors Corp.* v. *General Motors Corp.* 340 US 558, 567-69, which involved the effect to be ascribed to a verdict of guilty in a Government antitrust prosecution, that Clayton Act § 5(a) renders a judgment *prima facie* evidence in a treble damage action only of those facts as to which it would work a collateral estoppel between the Government and the defendant. *Prima facie* weight therefore attached in *Emich* only to findings which were "essential to" the verdict of guilty and thus "necessarily decided" by it. 340 US at 569. As the late Chief Judge Clark held in *Monticello Tobacco Co., Inc.* v. *American Tobacco Co.* 197 F.2d 629, 631-32 (CA 2 1952), cert. denied 344 US 875, which this Court cited with approval in *Partmar Corp.* v. *Paramount Pictures Theatres Corp.* 347 US 89, 102 n.8, it follows that *prima facie* effect cannot be extended to a finding which is inferred from, but not required by, a verdict of guilty:

> "But whatever is crucial to the treble-damage case and is not distinctly determined in the previous gov-

> ernment suit must be proven by direct evidence. Dipson Theatres v. Buffalo Theatres, 2 Cir., 190 F. 2d 951, 958, certiorari denied 342 U. S. 926, 72 S. Ct. 363. Section 5 [of the Clayton Act] does not permit a haphazard use of a criminal judgment merely for its aura of guilt, or 'to imply new wrongdoing from past wrongdoing.' Hastie, C. J., dissenting in Milgram v. Loew's, Inc., 3 Cir., 192 F. 2d 579, 595. See also Note, 65 Harv. L. Rev. 1400, 1404-1407."

The Federal courts (with the apparent exception of the courts below) have recognized that the *prima facie* effect of an equity decree rendered in a Government civil antitrust suit is subject to the same limitation. *Gottesman* v. *General Motors Corp.* 221 F. Supp. 488 (SDNY 1963); cf. *Farmington Dowel Prods. Co.* v. *Forster Mfg. Co., Inc.* 1967 Trade Cas. ¶ 72,262 (D. Maine No. 2 1967). Thus a treble-damage plaintiff may not rely upon a decree finding a violation during a specified period as evidence that the violation continued after that period. *Dart Drug Corp.* v. *Parke, Davis & Co.* 344 F. 2d 173, 183-86 (CA DC 1965); *Buckhead Theatre Co.* v. *Atlanta Enterprises, Inc.* 327 F. 2d 365 (CA 5 1964), cert. denied 379 US 888; *International Shoe Mach. Corp.* v. *United Shoe Mach. Corp.* 315 F. 2d 449 (CA 1 1963), cert. denied 375 US 820; *Webster Rosewood Corp.* v. *Schine Chain Theatres, Inc.* 263 F. 2d 533 (CA 2 1959), cert. denied 360 US 912; cf. *Theatre Enterprises, Inc.* v. *Paramount Film Distrib. Corp.* 346 US 537.

The limitation of *prima facie* effect to findings expressly or necessarily made in a prior decree follows from the fact that the general doctrine of collateral estoppel extends only to facts found either expressly or by necessary implication in the prior decree: "An inference must be inevitable, or it cannot be drawn." *Burlen* v. *Shannon* 99

Mass. 200, 203 (1868), quoted in 1-B Moore *Federal Practice*, ¶ 0.443[4], at 3913 (2 ed. 1965). To the same effect are *Hopkins* v. *Lee* 19 US (6 Wheat.) 109, 114; 2 Freeman, *Judgments* §§ 691, 693 (5 ed. Tuttle 1925). As this Court stated in *Yates* v. *United States* 354 US 298, 338, approving the opinion of Judge Learned Hand in *The Evergreens* v. *Nunan* 141 F. 2d 927 (CA 2 1944), cert. denied 323 US 720:

> "The normal rule is that a prior judgment need be given no conclusive effect at all unless it establishes one of the ultimate facts in issue in the subsequent proceeding."

The reason for this limitation is clear. Since it is a sweeping doctrine attaching potentially crushing consequences to a judgment or decree, collateral estoppel must in justice be limited to areas where the party estopped must have anticipated such consequences. The case is all the more compelling when the effect given the prior judgment or decree is not limited to the same parties, as is collateral estoppel, but is extended by Clayton Act § 5(a) to third parties, a field which this Court in *Minnesota Mining & Mfg. Co.* v. *New Jersey Wood Finishing Co.* 381 US 311, 317, described as "the delicate area in which a judgment secured in an action between two parties may be used by a third."

Thus before Hanover may rely upon the decree in the Government suit, it must establish that the decree and essential findings expressly or by necessary implication hold United's lease-only policy to be monopolization. It is not enough, contrary to what both courts below apparently assumed, to hold that the illegality of the lease-only policy is a possible inference from the auxiliary findings in the Government suit. As shown earlier, Hanover has failed

to establish that it is even a possible inference, and certainly it is not a necessary inference.

**E. Hanover may not rely upon the decree in the Government suit because Hanover was not among those found by Judge Wyzanski to be affected by the exclusionary features of United's leases.**

Judge Wyzanski's condemnation of aspects of United's leases rested upon his conclusion that they hampered United's competitors, not upon any finding that they injured Hanover or other shoe manufacturers. In fact, his findings outlined at length the benefits derived by shoe manufacturers from United's leasing policy. 110 F. Supp. at 323, 340. Even in explaining in his Opinion on Remedy why he chose to require United for the future to sell as well as lease its machines, Judge Wyzanski made it clear that he was concerned with impact upon United's competitors, not upon its customers:

> "For present purposes it may be assumed that the anti-trust laws are not designed, chiefly, if at all, to give a customer choice as to the selling methods by which his supplier offers that supplier's own products." *Id.* at 349-50.

The Courts of Appeals have held that in order to recover treble damages a plaintiff

> "must show that he is within that area of the economy which is endangered by a breakdown of competitive conditions in a particular industry. Otherwise he is not injured 'by reason' of anything forbidden in the anti-trust laws."

*Conference of Studio Unions* v. *Loew's Inc.* 193 F.2d 51, 54-55 (CA 9 1951), cert. denied 342 US 919. See to the

same effect *South Carolina Council of Milk Producers, Inc.* v. *Newton* 360 F.2d 414 (CA 4 1966), cert. denied 385 US 934; *Productive Inventions, Inc.* v. *Trico Prods. Corp.* 224 F.2d 678 (CA 2 1955), cert. denied 350 US 936; *Karseal Corp.* v. *Richfield Oil Corp.* 221 F.2d 358 (CA 9 1955).. As Judge Wyzanski has elsewhere noted, *Snow Crest Beverages, Inc.* v. *Recipe Foods, Inc.* 147 F. Supp. 907, 909 (D. Mass. 1956), such a limitation of recovery to plaintiffs within the "target area" of defendant's violation is necessary to avoid "liabilities of indefinable scope" for multiple damages, and "Congress has failed to amend the anti-trust laws on this point in the face of repeated decisions." A similar approach is applied in tort law generally, where only compensatory, not treble damages, are involved, but where recovery is limited to plaintiffs to whom possible injury was reasonably foreseeable when the defendant acted. E.g. *Palsgraf* v. *Long Island R. R.* 248 N.Y. 339, 342-45, 162 NE 99-101 (1928).

Since treble damages may be recovered only by a plaintiff within the "target area" of a violation, the *prima facie* effect of Clayton Act § 5(a) can be availed of only by a plaintiff within what the court in the Government suit found was the target area of the violations it held to exist. See *Eagle Lion Studios, Inc.* v. *Loew's, Inc.* 248 F. 2d 438, 444-45 (CA 2 1957), aff'd *per curiam* by an equally divided Court 358 US 100. Judge Wyzanski found that United's leases had an exclusionary impact only upon United's competitors. The exclusionary effect derived largely from the benefits which they conferred on United's customers, the lessees, whose resistance to competitors was "founded on their long-term, satisfactory relations with United" (110 F. Supp. at 344; and see discussion at pp. 8-9 above).. Hanover, like other shoe manufacturers, is therefore outside the ambit of the violations found by Judge

Wyzanski, and cannot rely upon the decree in the Government suit as *prima facie* evidence of monopolization in this case.[11]

## II. EVEN IF JUDGE WYZANSKI HAD HELD UNITED'S LEASE-ONLY POLICY ITSELF TO BE A VIOLATION, INJURY AND THREE-FOLD DAMAGES SHOULD NOT BE BUILT UPON A RETROACTIVE APPLICATION OF SUCH HOLDING.

### A. United had no reason to believe that its lease-only policy constituted monopolization.

#### (1) This Court had approved the features of United's leases which the Government suit attacked.

In the first United case to reach the Supreme Court, *United States* v. *Winslow* 195 Fed. 578 (D. Mass. 1912), aff'd in part 227 US 202 (1913), this Court affirmed the dismissal of indictments attacking the formation of United under Sherman Act §§ 1, 2, but said:

> "The only question before us is whether that combination, taken by itself, was within the penalties of the Sherman Act. The validity of the leases, or of a combination contemplating them, cannot be passed upon in this case." 227 US at 217.

The second United case, *United States* v. *United Shoe Mach. Co.* 222 Fed. 349 (D. Mass. 1915), aff'd 247

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[11]The Court of Appeals concluded that *Chattanooga Foundry & Pipe Works* v. *City of Atlanta* 203 US 390, which held that a purchaser of pipe the price of which was raised by a price-fixing conspiracy could recover treble damages from the conspirators, supported Hanover's recovery here, 377 F. 2d at 783-84, A. 196. But that purchaser was clearly the target of the price-fixing conspiracy, while Judge Wyzanski held that the target of United's exclusionary lease clauses was its competitors, not its customers.

US 32 (1918), was a bill in equity alleging that the formation of United, its subsequent acquisitions of other shoe machinery manufacturers and patents, and its leases offended sections 1 and 2 of the Sherman Act. Each of the three judges sitting in the district court wrote an opinion; and each observed that the Government had abandoned during the trial its contention that the lease-only policy itself was unlawful; Circuit Judge Putnam and District Judge Brown added that the record showed that it was "not injurious" and "unimpeachable". 222 F. at 352, 386, 401.

The opinion of this Court stated that one of the Government's contentions was "that the leases are invalid in and of themselves". 247 US at 59. The Court went on to say:

> "The first objection made to the leases is that they are unchangeable by the lessee—he 'has no right,' it is urged, to demand either the cancellation or modification of an existing one. The objection is not definite or measurable. It is probably but a representation of what is deemed the severity of the leases, for, of course, a contract is a restraint upon option and can be enforced. This power is its efficacy and indicates its obligation. And further it is of no consequence that the leases cover all of the machines of the United Company if they are an exercise of the patent rights. Whether they are is the broad question in the case and its disposition will dispose of all minor and dependent ones." *Ibid.*

After describing the clauses in the leases which the Government specifically attacked, *id.* at 59-63, the Court concluded:

> "The evil potency ascribed to *the leases* (we use the word as inclusive of the clauses and we do not think it necessary to distinguish them according to their application to particular machines) by the Government is their asserted coercion of shoe makers and machinery makers. They limit the freedom of the first, it is contended, and by that limitation preclude the competition of the second with the defendants . . . . *The evidence disproves this.*" *Id.* at 63. (Emphasis supplied.)

In rebutting the charge of coercion the Court emphasized the advantages to a shoe manufacturer of not having to invest capital in machinery and of United's service. Thus, once again, its language shows that it was considering the lease-only policy itself, not merely the leases' restrictive clauses. At the very least, the Court was insisting that those clauses must be viewed in the context of the business advantages of the leases as a whole. Moreover, approval of the clauses necessarily implies approval of the lease-only policy since it would be unnecessary to consider specific clauses if lease-only as such were illegal. Mr. Justice Day, speaking for the minority of three, limited his attack to "certain provisions" of the leases. *Id.* at 68. Thus analysis of the opinions in the second United Shoe case supports this Court's later conclusion in *Hartford-Empire Co.* v. *United States* 323 US 386, 412 and n.10, that it established "that the lease of a patented machine is a lawful method of exercising the exclusive patent right", even by a patentee with a commanding market position, and that the dissenting justices did not suggest the contrary.

The third United case, *United States* v. *United Shoe Mach. Co.* 234 Fed. 127 (E.D. Mo. 1916), 264 Fed. 138 (E.D. Mo. 1920), aff'd in part 258 US 451 (1922),

was a suit under Clayton Act § 3 to enjoin certain clauses of United's leases, notably the tying conditions of the pre-1914 leases. The Government did not attack the lease-only policy, and the district court in its first opinion held the full-capacity clause, among other provisions, lawful, thereby necessarily upholding the lease-only policy. 234 F. at 151. Only United appealed from the district court's final decree, which enjoined the tying conditions. Thus, while this Court affirmed the decree in this respect, it had no occasion to pass on the lease-only policy.

Of the three United cases which reached the Supreme Court in 1913, 1918, and 1922, therefore, only the second dealt with the lease-only policy. But that case upheld the policy.

The correct and only possible conclusion therefore is that recently stated by Judge Wyzanski in amplifying his reasons for rejecting the proposal in the Government case that United be dissolved. He said this Court "had permitted United to proceed with leasing as an exclusive method of distributing machines. . . ." *United States* v. *United Shoe Mach. Corp.* 266 F. Supp. 328, 330 (D. Mass. 1967). The Court of Appeals in the case at bar also took this view (pp. 21-22 above).

**(2) Judge Hand's holding in Alcoa, approved by this Court in American Tobacco, gave United no reason to believe that its lease-only policy constituted monopolization.**

This Court in *American Tobacco Co.* v. *United States* 328 US 781, 811-14, approved certain passages from the opinion of Judge Learned Hand in *United States* v. *Aluminum Co, of America* 148 F. 2d 416, 427-32 (CA 2 1945). The court below thought such approval "clearly announced a change in the applicable law", 377 F. 2d at 788, A. 206, which indicated that United's lease-only policy

would now be held monopolization. To the contrary we submit that the holdings in *Alcoa* and *American Tobacco* gave United no such warning that this Court's approval of its lease-only policy had been undermined.

In the passage which this Court approved in *American Tobacco,* Judge Hand wrote that Alcoa had monopolized although

> "it insists that it never excluded competitors; but we can think of no more effective exclusion than progressively to embrace each new opportunity as it opened, and to face every newcomer with new capacity already geared into a great organization, having the advantages of experience, trade connections and the elite of personnel. Only in case we interpret 'exclusion' as limited to manoeuvres not honestly industrial, but actuated solely by a desire to prevent competition, can such a course, indefatigably pursued, be deemed not 'exclusionary.'" 148 F. 2d at 431.

This passage must be read in light of the extensive evidence that Alcoa had purposely pre-empted bauxite sites, *id.* at 433-34, and power sites developed by James B. Duke on the Saguenay River in Canada, *id.* at 434-35, and had subjected aluminum fabricators to a price squeeze, *id.* at 436-38. Although the Second Circuit felt able to reverse the lower court's findings of fact in favor of Alcoa only as to the price squeeze, this voluminous evidence of Alcoa's positive acts of exclusion clearly weighed heavily in its holding that Alcoa had monopolized. This is the interpretation placed on the decision by the Attorney General's National Committee to Study the Antitrust Laws (1955) p. 60. Similarly, in *American Tobacco,* where this Court approved the quoted

language from *Alcoa*, the facts showed a conspiracy of the major cigarette producers to fix prices, allocate markets, and eliminate competitors.

Neither the language nor the facts of these cases suggested that United's lease-only policy might be held to be monopolization. Far from aggressively embracing each new opportunity to expand and block competitors, United merely continued to conduct its business by the traditional methods in a relatively limited, inelastic, and static market. And, as Judge Wyzanski specifically found:

> "United's power does not rest on predatory practices. Probably few monopolies could produce a record so free from any taint of that kind of wrongdoing." 110 F. Supp. at 345.

The standard by reference to which Judge Wyzanski found United had monopolized was that any defendant with monopoly power has monopolized if its

> "strength is not attributable solely to [its] ability, economies of scale, research, natural advantages, and adaptation to inevitable economic laws." *Id.* at 343.

This standard is clearly a bold and sweeping extension of the quoted passage from *Alcoa*. Under it, not only the monopolist who has aggressively blocked every attempt of a potential competitor to enter, but also any monopolist who cannot meet the rigid burden of showing that his predominant market share is inevitable, has monopolized. See now *United States* v. *Grinnell Corp.* 384 US 563, 570-71 (1966). This concept was one of gradual evolution after *Alcoa* and *American Tobacco*, and those decisions did not put United on fair warning that this was the standard to be applied to it.

**B. The retrospective award of treble damages in this case is grossly unfair.**

**(1) Treble damages should not be awarded on the basis of a changed rule of antitrust law.**

We have pointed out above (pp. 46-48) the change effected in the law in relation to United's situation by Judge Wyzanski and this Court in 1953 and 1954. Even if the disputed interpretation of his decree were resolved in favor of a determination that the lease-only system was illegal in the pre-1953 period (and we have shown above, pp. 27-33 that it cannot properly be so interpreted), certain it is that that result was not established until 1955, the effective date of the decree after affirmance here, 347 US 521.

Hence the award to Hanover rests upon the retroactive application of a change in the law. Such a rule offends fundamental principles of justice and cannot be allowed to stand. In *Simpson* v. *Union Oil Co.* 377 US 13, 24-25, when this Court overturned the prior rule allowing resale price maintenance under consignment arrangements and held that such price maintenance violates Sherman Act § 1, the Court added:

> "We reserve the question whether, when all the facts are known, there may be any equities that would warrant only prospective application in damage suits of the rule governing price fixing by the 'consignment' device which we announce today."

The courts which have considered the question of the retrospective application of overruling decisions in treble damage actions have held, as this Court intimated in *Simpson,* that justice requires denial of such retrospective application. *Simpson* v. *Union Oil Co.* 270 F. Supp. 754 (N. D. Cal. 1967); *Lyons* v. *Westinghouse Elec. Corp.* 235 F. Supp. 526, 536-37 (SDNY 1964). In fact, the Court of

Appeals in the case at bar accepted that principle by refusing to apply what it felt to be the implication of *American Tobacco* to years prior to 1946, 377 F. 2d at 787-90, A. 203-07. It erred however by failing to implement the principle to its full and logical extent.

The equities against retrospective application of overruling decisions in treble damage actions are compelling. "The punitive two-thirds portion of a treble-damage antitrust recovery" is "extracted from the wrongdoers as punishment for unlawful conduct", *Commissioner* v. *Glenshaw Glass Co.* 348 US 426, 427, 431, and the primary purpose of the treble damage provisions is to deter the commission of acts violative of the antitrust laws. This Court has stressed that where the purposes of a newly announced rule of law will not be served by retrospective application, it will not be so applied. *Johnson* v. *New Jersey* 384 US 719, 728; *Tehan* v. *United States ex rel. Shott* 382 US 406, 410; *Linkletter* v. *Walker* 381 US 618, 629. See also *Mosser* v. *Darrow* 341 US 267, 275-76 (Black, J. dissenting). Since the true function of the treble damage provisions is punitive and deterrent, retrospective imposition of treble damages where the law is changed would be pointless as well as unjust: an actor cannot shape his conduct to a rule which is announced only after he has acted. *Lyons* v. *Westinghouse Elec. Corp.* 235 F. Supp. 526, 537 (SDNY 1964). This Court has also emphasized that a new rule of law should not be applied retrospectively so as to defeat justifiable reliance. *England* v. *Louisiana State Bd. of Medical Examiners* 375 US 411, 422. Since businessmen rely upon existing law—particularly in United's case, where this Court had three times reviewed its activities—in shaping their actions, the extension backward of an alteration in the law, by the retroactive grant of treble damages for acts innocent when

performed, would stultify the legal process and warp the rule of law in this country.

Ample precedent exists for refusing to work injustice by retrospective application of a change in the law in a quasi-penal treble damage action. As this Court has held, the old Blackstonian theory that the law has always been what the latest case declares it to be has given way to a realistic recognition that action in reliance upon the earlier law cannot be disregarded. *Linkletter* v. *Walker* 381 US 618, 622-25. This principle is not limited to criminal cases. See generally Judge Schaefer's Cardozo Lecture *The Control of "Sunbursts": Techniques of Prospective Overruling,* 22 New York City Bar Assn. *Record* 394 (1967). The principle has especial vitality in the areas of contract, corporate, and other business and financial law, where reliance upon existing rules is universal. See e.g., *State ex rel. Washington State Fin. Comm.* v. *Martin* 62 Wash. 2d 645, 384 P. 2d 833 (1963); Annotation, *Prospective or Retroactive Operation of Overruling Decision,* 10 A. L. R. 3d 1371, 1388-89 (1966). This Court recognized the principle in *Gelpcke* v. *City of Dubuque* 68 US (1 Wall.) 175, 206, holding that municipal bonds whose validity had been upheld by the highest State court would be recognized in a Federal court despite an overruling decision by the State court, since "to hold otherwise would be as unjust as to hold that rights acquired under a statute may be lost by its repeal."[12] As the Court of Appeals recognized, the same principle must in justice be applied to this case, although that Court gave it only partial, inadequate application.

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[12]The precise holding of *Gelpcke* v. *City of Dubuque* has probably been overruled by *Erie R. R.* v. *Tompkins* 304 US 64. See *Tidal Oil Co.* v. *Flanagan* 263 US 444, 451-52. The general principle there enunciated, however, remains a valid guide to the retrospective application of overruling decisions by Federal courts.

**(2) Retrospective imposition of treble damages under Judge Wyzanski's standard of monopolization would be especially unjust.**

Judge Wyzanski held in the Government suit that a defendant possessing a predominant market share monopolizes whenever he institutes a practice which is both exclusionary and not inevitable. Even if United could have foreseen that this standard would be applied to it (which is not the case), it would have been virtually impossible for United to foretell what the results of its application would be. Should United have sold its machines, at the risk of being charged with creating steep barriers to entry into shoe manufacturing? Should it have instituted a conditional sale policy, at the risk of being accused of creating magnetic ties of partnership between itself and its conditional vendees? United could not with any assurance foresee what exclusionary impact the Government might allege and a court might find; even less could it foretell which alternative might appear most or least exclusionary to a court. Under these circumstances, the retrospective imposition of treble damages upon United would be even more unfair than retrospective application of other changed rules of antitrust law.

**III. EVEN ON ALL THE ASSUMPTIONS ADVERSE TO THE FOREGOING ARGUMENT (i.e. with the Wyzanski decree determinative of the illegality of lease-only and with retroactive application of a change in the law), NEVERTHELESS HANOVER SUSTAINED NO INJURY BECAUSE IT WOULD NOT HAVE BOUGHT THE MACHINES.**

**A. Rational economic choice would have dictated leasing.**

The damage calculations presented by Hanover made no allowance for any return upon the capital it would have had to invest in shoe machinery which it purchased, and thus grossly understated the cost and overstated the attrac-

tiveness of purchasing. The trial court adjusted Hanover's calculations only to the extent of reflecting an interest rate of 2.5%, the average rate it found Hanover would have paid had it borrowed the necessary capital, 245 F. Supp. at 292, A. 92, and the Court of Appeals affirmed the trial court's refusal to provide for a realistic return upon the capital Hanover would have had to invest in machinery which it purchased, 377 F. 2d at 791-92, A. 212-13. The assumption of the courts below that Hanover would have purchased machinery whenever it could obtain a return higher than the interest rate it would have had to pay on borrowed funds diverges so radically from the rational standards of investment policy established by the testimony of both parties' experts at trial, and from the criteria actually used by Hanover in deciding after the decree whether to lease or to purchase, as to reduce the finding below that Hanover would have purchased to one resting "on speculation or guesswork", which this Court held impermissible in *Bigelow* v. *RKO Radio Pictures, Inc.* 327 US 251, 264.

The testimony of United's expert Dr. John J. Corson, a partner in the management consulting firm of McKinsey & Company, established that the relevant "cost of capital" is the return which an investment in machinery must yield before it becomes as attractive as the most promising other uses for the firm's funds, including distribution to stockholders (A. 355-57, 360-63), and showed that in Hanover's case this cost of capital ranged from 14% to 22% (A. 363-67). Hanover's expert Dr. Richard M. Cyert agreed that cost of capital so defined is a proper tool for investment decision-making (A. 532-34), and disagreed only on the inclusion of cost of capital in the damage calculations (A. 546). Similarly, Hanover's investment banker Mr. Robert L. Spence of Hemphill Noyes & Company testified that whether it would be better to lease or to purchase "is just

a pure question of arithmetic" (R. 2516). Mr. Spence was then asked:

> "Would you yourself advise a client, a corporate client which raised its money by public issue at, say, twelve times earnings, to put the proceeds of the issue into the purchase of a fixed asset or of any asset of substantial size which would yield less than twelve times earnings?" (R. 2516-7)

Mr. Spence replied:

> "No. I think they should attempt to at least maintain their return or improve it if they can. We come back to a question of arithmetic. It is possible, however, that sometimes you must buy machinery or have your return go down. There is a question of obsolescence, new practices, new developments, where it may require you to spend money, even though you can't maintain the return. It is pretty much arithmetic, your best judgment at the time." (R. 2517)

The record also shows that the same cost of capital standard was employed by both United and the National Shoe Manufacturers Association (representing Hanover and other shoe manufacturers) in their negotiations required by decree par. 9 of a plan for terminating the outstanding leases with an option to purchase the machines. In these negotiations both sides accepted the cost of the capital required for purchase as a necessary element in comparing the proposed purchase prices with the Form A lease charges (this being the type of lease on which Hanover utilized United's machines during the period in controversy). The Association's expert Dr. Robert N. Anthony of Harvard University stated in his formal report to the Association

that "we are in agreement with Dr. [Joel] Dean [of Columbia University, United's expert] regarding . . . the premise that the cost of capital of a shoe manufacturer can best be estimated by taking the weighted average of the costs of his equity capital, his preferred stock, and his debt" (Def. Ex. 34, A. 653), and estimated that the cost of capital was at least 18% for the median shoe manufacturer (*id.* at A. 662-63). Finally, Dr. Corson's calculations showed that even the lowest cost of capital applicable to Hanover, 14%, taken together with the tax advantages of leasing, which the court below properly held should be taken into account, 377 F.2d at 792-93, A. 213-15, made it apparent that leasing would have been more advantageous that the hypothetical purchasing alternative throughout the complaint period (A. 387-99).

These inescapable indications that Hanover would not have bought because it was uneconomic to do so, were waved aside by the courts below on inadequate grounds, 245 F. Supp. at 289-92, A. 87-92; 377 F.2d at 791-92, A. 212-13. Yet the record clearly shows that Hanover itself employed a standard mathematically equivalent to the cost of capital standard. When the option to purchase United machines became available in 1955 pursuant to the decree in the Government suit, Hanover calculated for each machine the number of years required for the rental charges on the machine to pay for its purchase price. Aside from depreciation and other recurrent costs of ownership, this recoupment period is the exact reciprocal of the return to Hanover of its investment in the machine. A 20% return, for example, corresponds to a five-year recoupment period, and a 10% return to a ten-year recoupment period. Hanover's president, Lawrence B. Sheppard, testified:

> "We didn't have an exact measuring stick but if it looked like a machine would pay for itself, say,

> in five years as compared to the royalties and rentals or rental that we were then paying, we would buy it probably unless—and I wish to make this point clear—if the competitive machine was inferior to the United machine. . . ." (A. 325)

Thus if the recoupment period was more than *five years* (i.e. if the return, without deducting recurrent costs of ownership, was lower than *20%*), Hanover refused to buy. Mr. Sheppard's testimony is confirmed by a chart used by Hanover at the meeting on August 26 1955 at which it decided whether to lease or purchase a group of United machines (Def. Ex. 33, p. 22; A. 649). On that chart, opposite a machine with a recoupment period of 5.49 years (corresponding to a return of 18%), appears the notation in the handwriting of a Hanover officer (A. 496, 650) "Do not buy since it is a low yield machine." Thus Hanover's own conduct establishes conclusively that the cost of capital concept must be employed in any realistic determination whether it would have leased or bought during the complaint period, and Dr. Corson's testimony shows that cost of capital considerations, added to the tax advantages of leasing, would have led Hanover to lease, not to buy.[13] The courts below erred in disregarding the cost of capital standard, which decisively shows that Hanover would not have bought if it could.

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[13]Other advantages of leasing ignored by the lower courts include prompt and efficient machinery repair and maintenance service without separate charge (A. 296-97), lay-out service without separate charge (A. 308), machinery instruction service without separate charge (R. 2321), and avoidance of machine obsolescence because of the right of return of machinery to United (A. 300-01; Def. Ex. 73, A. 672).

**B. Hanover's failure to demand the right to buy machines in the complaint period, owing presumably to the economic undesirability of purchase, precludes this suit for refusal to sell, since prior demand is a condition precedent.**

Until the decision below, the Courts of Appeals had consistently held that a plaintiff may not recover treble damages for a refusal to deal alleged to violate the antitrust laws unless he can show that he made a distinct demand to be dealt with. "Plaintiff cannot claim to be damaged by a denial of what he did not request", as held in *Brown* v. *Western Mass. Theatres, Inc.* 288 F. 2d 302, 305 (CA 1 1961). In accord are *Royster Drive-In Theatres, Inc.* v. *American Broadcasting-Paramount Theatres, Inc.* 268 F. 2d 246 (CA 2 1959), cert. denied 361 US 885; *Webster Rosewood Corp.* v. *Schine Chain Theatres, Inc.* 263 F. 2d 533 (CA 2 1959), cert. denied 360 US 912; *J. J. Theatres, Inc.* v. *Twentieth Century-Fox Film Corp.* 212 F. 2d 840 (CA 2 1954); *Lawlor* v. *National Screen Serv. Corp.* 270 F. 2d 146, 154 (CA 3 1959), cert. denied 362 US 922; *Paramount Film Distrib. Corp.* v. *Applebaum* 217 F. 2d 101, 126-27 (CA 5 1954), cert. denied 349 US 961; *Milwaukee Towne Corp.* v. *Loew's, Inc.* 190 F. 2d 561 (CA 7 1951), cert. denied 342 US 909; *Columbia Pictures Corp.* v. *Charles Rubenstein, Inc.* 289 F. 2d 418 (CA 8 1961); *Continental Ore Co.* v. *Union Carbide & Carbon Corp.* 289 F. 2d 86, 91 (CA 9 1961), rev'd 370 US 690, 699-702 (see p. 60 below); *Standard Oil Co.* v. *Moore* 251 F. 2d 188, 198-99 (CA 9 1957), cert. denied 356 US 975.

In the field of public utilities and services, the only other significant area of American law in which a general duty to deal is imposed, such a duty likewise arises only upon a demand. This is so both at common law (e.g. 1 Wyman, *Public Service Corporations* § 407 [1911]; 1 Pond, *Public*

*Utilities* § 252 [4 ed. 1932]), and under modern statutes. Federal Communications Act § 201(a), 48 Stat. 1070 (1934), 47 USC § 201(a), and Interstate Commerce Act § 1(4), 54 Stat. 900 (1940), 49 USC § 1(4), both provide that a carrier must furnish service "upon reasonable request therefor". And in contract law, when a contract gives one party the option of demanding either of two modes of performance, an option like that Hanover contends it should have been afforded between leasing and purchasing, the other party may perform in either manner if the first party fails to specify which he desires; see Uniform Commercial Code § 2-311(3).

Two fundamental considerations of fairness underlie these requirements of demand. The *first* is that a supplier relies upon the absence of any demand that he change his policies as proof that his customers do not desire any change. The claimant of a right of purchase must in all equity and fairness make overt assertion of that right before he can penalize the supplier with an imputed refusal on which damages are to be calculated and then trebled. In the tranquil relationship between the parties extending back at least to 1912 (A. 6-7) United had every right to assume that Hanover was completely satisfied with the terms on which it used United machinery, equally with all other shoe manufacturers, to the increasing prosperity of Hanover. The *second* basic reason for a requirement of demand is that by his demand a potential plaintiff affords probative evidence that he would actually prefer to deal upon the basis he demands. See *Milwaukee Towne Corp.* v. *Loew's, Inc.* 190 F.2d at 567-69. Dispensing with such a requirement would enable plaintiffs to recover treble damages based solely upon speculative theories of injury constructed with the aid of hindsight, as Hanover seeks to do here.

The Court of Appeals characterized a demand to purchase as a "futile gesture" which "it would be ironic as

well as idle" to require of Hanover, 377 F. 2d at 781, A. 190, citing *Continental Ore Co.* v. *Union Carbide & Carbon Corp.* 370 US 690, 699. The lower court's conclusion that demand would have been futile is based solely upon the self-serving testimony of a Hanover officer,[14] see 377 F. 2d at 781, A. 190. If such testimony were held to excuse a failure to make demand, the demand requirement would in effect be emasculated. Moreover, if, as the Court below would have it, the implications of the *Alcoa* and *American Tobacco* decisions were clear enough to apprise United of a change in the law regarding its leasing system, 377 F. 2d at 788-90, A. 204-09, certainly a demand by Hanover after the change in the law cannot be presumed futile. In fact, in the only record instance in which Hanover complained about a clause in United's leases, the clause was stricken by United (A. 309-10).

Even if there were probative evidence in the record that demand would have been futile, the second basic reason for the demand requirement, that of demonstrating *ante litem motam* that Hanover would in fact have chosen to purchase, cannot be satisfied without an actual demand. This is especially true where United was already dealing with Hanover through leases whose rentals the trial court in this case held reasonable.[15] Thus the claimed futility of

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[14]In fact, this testimony consisted of a single volunteered and unresponsive rejoinder by Hanover's president Lawrence B. Sheppard to a question whether Hanover ever asked to purchase, Mr. Sheppard's "answer" being that "it would have been sort of a foolish question, wouldn't it?" (A. 317)

[15]Hanover attempted in the Court of Appeals to distinguish the uniform line of cases enunciating the demand requirement on the ground that they involved conspiracies among motion picture distributors and that "in such a case a plaintiff must show that he is no stranger to defendant and that he wanted the films." Brief, p. 8. But in all the motion pictures cases the plaintiff was already exhibiting second-run films, and was thus clearly "no stranger to defendant". The real reason for the adoption of a demand requirement in the

a demand does not excuse Hanover's persistent failure to make one.

*Continental Ore Co.* v. *Union Carbide & Carbon Corp.* 370 US at 699-702, does not support the holding below that asserted futility excuses a failure to demand. Indeed, the petitioners there argued not that demands would have been futile but that many demands had been made. Petitioners' Opening Brief, pp. 59, 101-05. This Court held that a jury could find that the plaintiffs had made "repeated approaches" seeking to purchase vanadium oxide from defendants, thus fully satisfying the demand requirement, 370 US at 700. Even more important, this Court stressed evidence that the defendants "had interfered with, acquired, or destroyed the several small independent sources of vanadium oxide relied upon by" the plaintiffs; and the Court made it clear that this evidence of direct monopolization wholly distinguished *Continental Ore* from the cases holding that demand is a prerequisite to recovery of treble damages for a refusal to deal, 370 US at 699-700 and n.8.[16] Finally, United leased its machines to Hanover at rentals which have been held reasonable, while the defendants in *Continental Ore* never dealt with the plaintiffs.

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motion picture cases, *which applies equally to Hanover,* is that, in Hanover's own words, "a plaintiff must show . . . that he wanted the films."

[16]The Court of Appeals for the Seventh Circuit drew the same distinction in *Congress Bldg. Corp.* v. *Loew's, Inc.* 246 F. 2d 587, 595 (1957), stating that *Milwaukee Towne Corp.* v. *Loew's, Inc.* "held properly, we think, that without a demand or request to deal there could be no refusal to deal," but did not hold that demand was a condition precedent to a treble damage action on another ground.

## IV. HANOVER SUSTAINED NO DAMAGE FROM UNITED'S LEASE-ONLY POLICY.

### A. Cost of capital considerations show that Hanover sustained no loss by leasing.

As shown in Point III.A, pp. 52-56 above, because of cost of capital considerations Hanover would have leased instead of purchased United machinery even had the option to purchase been available. The same considerations demonstrate that, if it is assumed that Hanover would have purchased, contrary to rational economic calculations such as those Hanover itself employed in 1955, it suffered no damage by being denied the opportunity to do so, since the leasing alternative was in fact more advantageous, and the lease charges have been held reasonable by the courts below. The Court of Appeals rejected this conclusion on the erroneous ground that cost of capital represents a "novel concept" which "has not yet reached the point of general acceptance even among economists", 377 F. 2d at 792, A. 213. The clear error of this position is shown by the fact that Hanover itself used an almost identical method of making investment decisions (pp. 55-56 above).

### B. Any excess of cost of leasing over cost of ownership was not absorbed by Hanover but passed on to others.

The record of the passing-on trial shows that during the complaint period increases in Hanover's costs were generally more than matched by increases in its prices (App. 1960 86a, 174a); that 31 of the 39 letters from Hanover to its customer Sheppard & Myers, Inc. regarding changes in Hanover's prices justified the changes on the basis of changes in costs (App. 1960 84a-85a, 139a-56a); and that from 1944 to 1955 Hanover's profits

*increased* sharply while its volume of sales *decreased* significantly (App. 1960 87a-91a, 172a). United's expert, Dr. Jules Backman, Professor of Economics at New York University, concluded from these data that Hanover's management was highly cost-conscious in setting prices (App. 1960 84a-85a), and that its success in raising profits in the face of declining sales, which would normally depress profits because of fixed overhead costs, showed an unusual ability and determination to pass on to its customers any increase in its costs (App. 1960 91a-94a).

A court could surely have found on this evidence that Hanover had not under Clayton Act § 4 been "injured in his business or property", 38 Stat. 731 (1914), 15 USC § 15, and therefore could not recover treble damages by reason of any claimed excess cost of leasing over cost of ownership because any such excess was not absorbed by Hanover but was transferred to its customers. It is fundamental in the law of torts that a plaintiff may not recover without showing that he has been injured. As this Court held in *Keogh* v. *Chicago & N. W. Ry.* 260 US 156, 165, also a treble damage action, plaintiff was not injured because

> "under these circumstances no court or jury could say that, if the rate had been lower, [plaintiff] would have enjoyed the difference between the rates or that any other advantage would have accrued to him. The benefit might have gone to his customers, or conceivably, to the ultimate consumer."

For the same reasons this Court held that a taxpayer who has not borne the burden of an allegedly illegal tax has no constitutional right to demand refund of the tax. *Anniston Mfg. Co.* v. *Davis* 301 US 337, 348-50; *United States* v. *Jefferson Elec. Mfg. Co.* 291 US 386, 401-03.

Until the decision of Judge Goodrich in the passing-on trial (pp. 15-16 above), every court which dealt with the issue had held, in accord with this Court's holding in *Keogh*, that a plaintiff who passed an alleged overcharge on to his customers had sustained no "injury to his business or property" and therefore could not recover treble damages.[17] See *Wolfe* v. *National Lead Co.* 225 F. 2d 427 (CA 9 1955), cert. denied 350 US 915; *Clark Oil Co.* v. *Phillips Petroleum Co.* 148 F. 2d 580 (CA 8 1945), cert. denied 326 US 734; *Northwestern Oil Co.* v. *Socony-Vacuum Oil Co.* 138 F. 2d 967 (CA 7 1943), cert. denied 321 US 792; *Twin Ports Oil Co.* v. *Pure Oil Co.* 119 F. 2d 747 (CA 8 1941), cert. denied 314 US 644.

Judge Goodrich refused to follow these decisions on the ground that Hanover's injury, if any, "occurred when it was charged too much for the machinery" and that "things which happen later and let an injured plaintiff escape some of the ultimate consequences of the wrong done him do not inure to the benefit of the defendant." 185 F. Supp. at 829. This legalistic and artificial argument is refuted by the principle of mitigation and avoidance of damages. Note, *Private Treble Damage Antitrust Suits: Measure of Damages for Destruction of All or Part of a Business*, 80 Harv. L. Rev. 1566, 1579, 1584 (1967).[18] Judge Goodrich also

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[17]The legislative history of the predecessor of Clayton Act § 4 points to the same conclusion. As Senator Sherman's bill was referred to the Senate Committee on the Judiciary, it granted a right of action to "any person or corporation injured or damnified" for "twice the amount of damages sustained". 21 Cong. Rec. 2600, 2731 (1890). The Committee amended the section to provide that a plaintiff should "recover threefold the damages *by him* sustained" (emphasis supplied), *id.* at 2901, and the section was enacted in this form. 26 Stat. 210 (1890). Thus, by express Congressional choice, treble damage plaintiffs must show that they themselves have suffered damage.

[18]If events prior to trial eliminate harmful consequences, damages may not be recovered. Restatement, Torts § 910 Comment b (1939); *Town of Basic City* v. *Bell* 114 Va. 157, 76 SE 336 (1912); *City*

drew a distinction, reaffirmed by the court below in *Freedman* v. *Philadelphia Terminals Auction Co.* 301 F. 2d 830 (CA 3 1962), cert. denied 371 US 829, and on the second appeal in this case, 377 F. 2d at 783, A. 194-95, between "middlemen", whom he held to be subject to the passing-on principle, and "consumers", like Hanover, whom he held not to be subject to it. 185 F. Supp. at 830-31. This attempted distinction is also artificial, since either a "middleman" or a "consumer" may pass on an alleged overcharge. Pollock, *Standing to Sue, Remoteness of Injury, and the Passing-on Doctrine,* 32 ABA Antitrust L.J. 5, 28 (1966); Note, *Private Treble Damage Antitrust Suits: Measure of Damages for Destruction of All or Part of a Business,* 80 Harv. L. Rev. 1566, 1585 (1967).[19]

Since Judge Goodrich's decision in the case at bar the passing-on defense has been rejected in electrical equipment price-fixing conspiracy actions brought by utilities. *Commonwealth Edison Co.* v. *Allis-Chalmers Mfg. Co.* 335 F. 2d 203 (CA 7 1964); *Ohio Valley Elec. Corp.* v. *General Elec. Co.* 244 F. Supp. 914, 949-51 (SDNY 1965); *Public Util. Dist. No. 1* v. *General Elec. Co.* 230 F. Supp. 744 (WD

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*of Joliet* v. *Blower* 155 Ill. 414, 40 NE 619 (1895). Judge Goodrich relied on examples within the so-called collateral source doctrine which constitute special exceptions not applicable here—reimbursement through an insurance policy, gratuities of friends and wages continued by an employer. In such cases, the collateral source pays the injured party pursuant to consideration afforded or as a gratuity, intending that such payment should not reduce damages. Moreover, the unrelated source would have no cause of action to recover the amount furnished.

[19] Judge Goodrich also relied upon *Southern Pac. Co.* v. *Darnell-Taenzer Lumber Co.* 245 US 531, which permitted a shipper to obtain a reparation order under the Interstate Commerce Act whether or not it passed on the overcharge. The reliance is misplaced because ICC reparation proceedings are designed only to prevent carriers from retaining more than provided by the tariffs approved by the Commission, and the Court emphasized that the only person the statute allows to sue for reparation is the shipper who is in privity with the carrier. 245 US at 534.

Wash. 1964); *Atlantic City Elec. Co.* v. *General Elec. Co.* 226 F. Supp. 59 (SDNY), appeal denied 337 F. 2d 844 (CA 2 1964). The courts which decided these cases, however, were frank to point out that the most important bases for their decision were that the only other potential plaintiffs were the utilities' millions of customers, who had already been held to lack standing to sue the equipment manufacturers, *Commonwealth Edison Co.* v. *Allis-Chalmers Mfg. Co.* 315 F. 2d 564 (CA 7 1963), cert. denied 375 US 834, and that any recovery by the utilities would in effect be given to their customers through lower rates mandated by the utility commissions. 335 F. 2d at 208-09; 226 F. Supp. at 70-71.

Neither of those reasons holds in this case. During the complaint period Hanover has sold to only four customers: Sheppard & Myers, Inc., Montgomery Ward, J. C. Penney, and the United States Government (245 F. Supp. at 264, A. 30-1); these four customers could easily have sued to recover any supposed overcharges which were imposed on them. And if Hanover is permitted to recover treble damages for alleged over-charges which it passed on to its four customers, nothing will compel it to allow the customers any of the benefit of the recovery, which will therefore be a windfall to Hanover.[20] If on the other hand any of the four customers in turn passed the alleged overcharges on to their customers, the latter could bring a class action under Rule 23, as recently amended by this Court, 383 US 1031, 1047, to recover treble the amount of any damage they sustained. See *Union Carbide & Carbon Corp.* v. *Nisley* 300 F. 2d

[20]The injustice of such windfall is not disposed of by the comment of the Court of Appeals in the 1960 appeal, to-wit, that Congress "imposed this rigorous penalty" and, if it resulted in a windfall, then modification of Clayton Act § 4 "would be for the Congress", 281 F. 2d 481. The *petitio principii* is obvious: the very question is whether Congress intended by the word "injury" such a generous donation to this unharmed lessee of shoe machinery.

561, 587-90 (CA 10 1961), cert. dismissed 371 US 801; Advisory Committee's Note to Proposed Amended Rule 23, 39 F. R. D. 98, 103 (1966).

Where a cus mer has in fact passed on an asserted overcharge, refusal to recognize the passing-on defense would subject defendants in United's position to multiple treble damage recoveries by different plaintiffs for the same increment of cost, a result whose pointless harshness cannot possibly have been contemplated by Congress. Thus, for example, several courts have held that a State or municipality may sue a manufacturer of construction materials used in a public project for treble damages for overcharges which were passed on to the plaintiff by the general contractor who bought from the manufacturer. *Armco Steel Corp.* v. *North Dakota* 376 F.2d 206 (CA 8 1967); *Washington* v. *American Pipe & Constr. Co.* 1967 Trade Cas. ¶ 72,233 (WD Wash. Sept. 14 1967); *Missouri* v. *Stupp Bros. Bridge & Iron Co.* 248 F. Supp. 169 (WD Mo. 1965), certificate to appeal denied 249 F. Supp. 111 (WD Mo. 1966); *Washington* v. *General Elec. Co.* 246 F. Supp. 960 (WD Wash 1965). Thus United should in justice be allowed the opportunity to show that Hanover sustained no injury from the lease-only policy even if that policy were illegal, because any excess cost of leasing over purchasing was not borne by Hanover.

## V. RECOVERY IS BARRED BY THE PENNSYLVANIA SIX-YEAR STATUTE OF LIMITATIONS.

The relations of the parties in respect of shoe machinery go back to 1912 at least (p. 5 above) and the damage period claimed under the liberal tolling provisions of the statute goes back to 1939. The statute of limitations, "on which the security of all men depends" (*Green* v. *Rivett* 2

Salk. 421, 91 Eng. Rep. 367 (K. B. 1702)), is a statute of repose subserving the high public policy of insuring the timely determination of controversies. Story J. in *Bell* v. *Morrison* 26 U.S. (1 Pet.) 351, 360 (1828); Stone C. J. in *Guaranty Trust Co.* v. *United States* 304 US 126, 136 (1938).

The crux for the determination of the limitations period in this case is the point of accrual of the liability, and for this it is essential to know the exact nature of the liability enforced by the judgment under review, amorphous and fugitive as that may seem. We have already argued that, upon a rejection of the Blackstonian jurisprudence, there could be no liability until Judge Wyzanski's decree of February 18 1953, and that the liability then determined by him did not outlaw the lease-only practice as followed theretofore. Acceptance of this argument requires dismissal of the action and leaves nothing for the statute of limitations to operate upon.

The courts below rejected this argument, erroneously as we submit. The District Court enforced a liability running back to 1939; the Court of Appeals, denying retroactivity in part but accepting the theory of the illegality of lease-only as a violation decreed by Judge Wyzanski, enforced a liability running back to 1946 (p. 22 above). In each case the liability so declared as a predicate for treble damages was that failure to sell (even though no demand was made for purchase and reasonable leases were executed) was the monopolization adjudicated.

On that theory of the judgment before the Court, we submit that the earliest impact of the refusal-to-sell practice, in or about the year 1912, marks the point of accrual and determines the running of the six-year statute of limitations, which therefore barred this action long ago. The controlling principle is set forth by the Pennsylvania court

in *Bernath* v. *LeFever* 325 Pa. 43, 46, 189 A. 342, 343 (1937):

> "It is too well-established to require extensive discussion that the statute runs from the time when the injury was done even though the damage may not have been known, or may not in fact have occurred, until afterwards."

The principle is lucidly stated by the Seventh Circuit Court of Appeals in a treble damage antitrust case, *Emich Motors Corp.* v. *General Motors Corp.* 229 F. 2d 714, 719 (1956):

> "With a few exceptions not here material, statutes of limitations begin running on the date on which the plaintiff first has the right to bring action. City of Beach v. Goepfert, 8 Cir., 147 F. 2d 480, 487. Therefore, our decision hinges upon whether the appellants could have brought this action as soon as Emich Motors received the notice of intention to cancel on April 7, 1936, or were compelled to wait until the cancellation became effective on September 1, 1936. If Emich Motors could have brought action before May 27, 1936, its action is barred. If it could not have brought action until after May 27, the action is not barred."[21]

This means that, if Hanover could have brought action in 1912 for damages from the application of a refusal-to-sell practice as an antitrust violation, it should have done

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[21]To the same effect are *Service Stages Inc.* v. *Greyhound Corp.* 170 F. Supp. 482, 486 (ND Ga. 1959), aff'd *per curiam* 268 F. 2d 739 (CA 5 1959); *Norman Tobacco & Candy Co., Inc.* v. *Gillette Safety Razor Co.* 197 F. Supp. 333 (ND Ala. 1960), aff'd 295 F. 2d 362 (CA 5 1961); *Campbell Distrib. Co.* v. *Jos. Schlitz Brewing Co.* 208 F. Supp. 523, 527 (D. Md. 1962).

so and the action is now barred. *Non constat* that lease-only had not been held by Judge Wyzanski as early as 1912 to be a violation; the Sherman Act existed then in the same terms as now, and it was the duty of Hanover to establish the violation and enforce its damages promptly rather than go along in Boeotian complaisance with the machinery leasing system, accumulating profits and expanding thereunder, and leave the establishment of the proper rule of law to the Antitrust Division. When a claimant believes himself injured, he cannot be excused from filing suit simply because the law may appear to be against him. *Marrero Morales* v. *Bull S.S. Co.* 279 F. 2d 299 (CA 1 1960); *Versluis* v. *Town of Haskell* 154 F. 2d 935, 942-3 (CA 10 1946). In such situation, the *Hanover* case itself might have brought about the change in the law which the Government suit was left to effectuate. To let a plaintiff sleep on his rights and wait for others to change the law would have the undesirable result of delaying the correction of injuries and improvements in the law. It would also frustrate the wise policy of the statute of limitations. *Order of R. R. Telegraphers* v. *Railway Express Agency, Inc.* 321 US 342, 348-49.

The Court of Appeals, on its reconsideration of the limitations defense upon rehearing, avoided this result with the argument that the execution of leases and collection of rentals within the six-year period antedating 1955 were overt acts over and above the mere re-assertion of a refusal to deal (377 F.2d at 794, A. 221). We submit that this reasoning misconceives the nature of the liability here in question. It is not the collection of rentals on legal leases and the entry into new legal leases which constituted an invasion of plaintiff's rights on the theory of the judgment

here being reviewed, since the leases between the parties, both within and outside the statutory period, were (as we have already pointed out, pp. 6, 12, 16, 44-45 above) entirely lawful and the charges reasonable. Entering into leases and collecting reasonable rentals have no bearing on whether United would sell if requested. It is the refusal-to-sell practice which *ex hypothesi* is attacked by the judgment, and it is the liability predicated on that practice which is now made stale and unenforceable by the wise policy of limitations.

The Court of Appeals in its supplemental opinion on limitations dealt on an erroneous basis with the authorities cited for the proposition that reiteration within the statutory period of a refusal to deal does not accrue a new cause of action where such refusal to deal originated in the period barred by statute. 377 F. 2d at 794 n. 2, A. 220 and cases cited. The distinctions made by the court below are that these authorities are antitrust conspiracy cases and also that damages in the statutory period and in the period barred could not be segregated. It is submitted that these distinctions are unsound. Civil conspiracy cases do not involve a different principle of accrual; moreover the cases cited, 377 F. 2d at 794 n. 2, A. 220 are not limited to conspiracy. In the second place those cases did not involve any problem of segregating damages between the periods before and that after the application of the bar of limitations. In fact the Court of Appeals recognized the applicability of the refusal-to-deal cases by acknowledging that a mere re-assertion of a refusal to sell does not accrue a new cause of action, 377 F. 2d at 794, A. 220.[22]

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[22]If the contrary were so, new causes of action could be created at whim by occasionally seeking to purchase, and the statute of limitations would be destroyed as a statute of peace. See *Sherman* v. *Goerlich's, Inc.* 238 F. Supp. 728 (ED Mich. 1963), aff'd 341 F. 2d 988 (CA 6 1965), cert. denied 382 US 830 (1965); *Garelick* v. *Goerlich's, Inc.* 323 F. 2d 854 (CA 6 1963); *Norman Tobacco &*

Accordingly, as the Court of Appeals recognized, if United at the turn of the century had refused to deal on any basis with Hanover, the cause of action would be barred by limitations even if United had re-asserted its refusal to deal within the limitations period. It would be illogical and unjust to change this result simply because United did deal with Hanover on a valid and reasonable basis which was traditional in the industry.

## CONCLUSION

The decisions below present points vital in the administration of the law generally on which grievous error has been committed. Reversal on any one of the issues other than those involving certification of the antitrust issue to Judge Wyzanski and the inclusion of cost of capital in the damage calculation, would require dismissal of the complaint. As to those two issues, reversal would require remand to the Court of Appeals for the guidance of the District Court on the second trial which has been ordered by the Court of Appeals (377 F. 2d at 793, A. 217).

So overriding however are the other and principal questions, and so critical in the proper development of the law, that it is submitted they should control the disposition of the case and compel dismissal of the action—an action which, lacking justification from the outset, has now bur-

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*Candy Co., Inc.* v. *Gillette Safety Razor Co.* 197 F. Supp. 333 (ND Ala. 1960), aff'd 295 F. 2d 362 (CA 5 1961); *Peto* v. *Madison Square Garden Corp.* 1965 Trade Cas. ¶ 71,398 (SDNY); *Gaetzi* v. *Carling Brewing Co.* 205 F. Supp. 615 (ED Mich. 1962).

dened the Third Circuit for twelve years. This Court's mandate to dismiss should therefore issue.

Respectfully submitted,

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November 22 1967

## Appendix A

*Sherman Act § 2, 26 Stat. 209 (1890), as amended, 69 Stat. 282 (1955), 15 USC § 2:*

> "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court."

*Clayton Act § 4, 38 Stat. 731 (1914), 15 USC § 15:*

> "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

*Clayton Act § 5(a), 69 Stat. 283 (1955), 15 USC § 16(a):*

> "A final judgment or decree heretofore or hereafter rendered in any civil or criminal proceeding brought by or on behalf of the United States under the antitrust laws to the effect that a defendant has violated said laws shall be prima facie evidence against such defendant in any action or proceeding

brought by any other party against such defendant under said laws or by the United States under section 4A, as to all matters respecting which said judgment or decree would be an estoppel as between the parties thereto: *Provided,* That this section shall not apply to consent judgments or decrees entered before any testimony has been taken or to judgments or decrees entered in actions under section 4A."

## Appendix B

*1 Sm. L. 76 (1713), 12 Purdon's Pa. Stats. § 31:*

"All actions of trespass quare clausum fregit, all actions of detinue, trover and replevin, for taking away goods and cattle, all actions upon account and upon the case (other than such accounts as concern the trade of merchandise between merchant and merchant, their factors or servants), all actions of debt grounded upon any lending, or contract without specialty, all actions of debt, for arrearages of rent, except the proprietaries' quit-rents, and all actions of trespass, of assault, menace, battery, wounding and imprisonment, or any of them, which shall be sued or brought at any time after the five and twentieth day of April, which shall be in the year of our Lord one thousand seven hundred and thirteen, shall be commenced and sued within the time and limitation hereafter expressed, and not after; that is to say, the said actions upon the case, other than for slander, and the said actions for account, and the said actions for trespass, debt, detinue and replevin, for goods or cattle, and the said actions of trespass quare clausum fregit within three years after the said five and twentieth day of April next, or within six years next after the cause of such actions or suit, and not after. And the said actions of trespass, of assault, menace, battery, wounding, imprisonment, or any of them, within one year next after the said five and twentieth day of April next, or within two years next after the cause of such actions or suit, and not after; and the said actions upon the case for words, within one year next after the words spoken, and not after."

UPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
DEC 22 1967
JOHN F. DAVIS, CLERK

IN THE

# Supreme Court of the United States

**OCTOBER TERM, 1967**

No. 463

UNITED SHOE MACHINERY CORPORATION,
*Petitioner,*

v.

THE HANOVER SHOE, INC.,
*Respondent.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

## BRIEF OF RESPONDENT THE HANOVER SHOE, INC.

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# INDEX


PAGE

A. As to Questions Presented in United Brief 3-4 .... 1

B. As to Statement of the Case in United Brief 4-22 2

1. As to the section "1. The Parties and the Lease Transactions," United Brief 4-7 ..... 2

2. As to section "2. Decree in the Government Suit," United Brief 7-12 ..... 5

3. As to section "3. Treble Damage Litigation Arising out of the Government Decree," United Brief 13-14 ..... 6

4. As to section "4. Hanover's case," United Brief 14-22 ..... 6

Summary of Argument ..... 9

Argument ..... 15

I Answer to United Brief, Points IA and IB, pp. 27-33, that the decree, the opinion and findings of the District Court and the contentions of the parties in the Government case shown that United's lease-only policy was not held to constitute monopolization .... 15

II Answer to United Brief, Point IC, pp. 33-38, that refusal by the District Court below to certify to the Massachusetts District Court questions of construction of the final decree in the Government case was an abuse of discretion ..... 25

III Answer to United Brief, Point ID, pp. 38-41, that Clayton Act §5(a) gives prima facie effect only to "findings made expressly or by necessary implication in the Government case" and excludes making "lease-only a violation by inference" ..... 31

PAGE

IV Answer to United Brief, Point IE, pp. 41-43, that Hanover was not within the "target area" of United's violation and may not, therefore, rely upon the final decree in the Government case ..... 32

V Answer to United Brief, Points IIA and IIB, pp. 43-52, that it would be "especially unjust" and "grossly unfair" to United to apply the Government case retroactively ..... 37

VI Answer to United Brief, Point IIIA, pp. 52-56, and to Point IV, p. 61, that Hanover sustained no injury because it would not have bought the machines and because cost of capital considerations show that Hanover sustained no loss by leasing ..... 44

VII Answer to United Brief, Point IIB, pp. 57-60, that a condition precedent to Hanover's recovery is prior demand to buy and Hanover failed to make such a demand of United 48

VIII Answer to United Brief, Point IVB, pp. 61-66, that Hanover sustained no damage because "any excess cost of leasing over cost of ownership was not absorbed by Hanover but passed on to others" ..... 53

IX Answer to United Brief, Point V, pp. 66-71, that Hanover's recovery "is barred by the Pennsylvania six year statute of limitations" 60

CONCLUSION ..... 61

APPENDIX A

Excerpts from transcript of oral argument in the Supreme Court of the United States in *United Shoe Machinery Corporation* v. *United States*, October Term, 1953, No. 394 ..... 1a

APPENDIX B

PAGE

Excerpts from Findings of Fact, Conclusions of Law and Opinion of Judge Sheridan dated April 28, 1965 in the United States District Court for the Middle District of Pennsylvania, *reported* 245 F. Supp. 287-294 ..... 1b

## TABLE OF CASES

*Alcoa (United States* v. *Aluminum Co. of America),* 148 F. 2d 416 (2d Cir. 1945) ..... 41, 52, 53
*Alden-Rochelle, Inc.* v. *American Society of Composers, Authors and Publishers,* 80 F. Supp. 888 (S.D.N.Y. 1948) ..... 57
*Aldrich* v. *Aldrich,* 375 U. S. 75 and 249 (1963) ..... 30
*American Crystal Sugar Co.* v. *Mandeville Island Farms,* 195 F.2d 622 (9th Cir. 1952), *cert. denied* 343 U. S. 957 ..... 57
*American Tobacco Co.* v. *United States,* 328 U. S. 781 (1946) ..... 4, 41, 42, 53
*Atlantic City Elec. Co.* v. *General Elec. Co.,* 226 F. Supp. 59 (S.D.N.Y.), *appeal denied* 337 F.2d 844 (2d Cir. 1964) ..... 57, 58, 59
*Chattanooga Foundry & Pipe Works* v. *City of Atlanta,* 203 U. S. 390 (1906) ..... 34, 56, 58
*Clark Oil Co.* v. *Phillips Petroleum Co.,* 148 F.2d 580 (8th Cir. 1945), *cert. denied* 326 U. S. 734 ..... 57
*Clay* v. *Sun Ins. Office Ltd.,* 363 U. S. 207 (1960) ..... 30
*Cole* v. *Hughes Tool Company,* 215 F. 2d 924 (10th Cir. 1954) *cert. denied* 348 U. S. 927 ..... 25
*Commonwealth Edison Co.* v. *Allis-Chalmers Mfg. Co.,* 315 F.2d 564 (7th Cir. 1963) *cert. denied* 375 U. S. 834 ..... 57, 58
*Commonwealth Edison Co.* v. *Allis-Chalmers Mfg. Co.,* 335 F.2d 203 (7th Cir. 1964) ..... 57, 58, 59
*Conference of Studio Unions* v. *Loew's Inc.,* 193 F.2d 51 (9th Cir. 1951), *cert. denied* 342 U. S. 919 ..... 34
*Continental Ore Co.* v. *Union Carbide & Carbon Corp.,* 289 F.2d 86 (9th Cir. 1961) *rev'd* 370 U. S. 690 (1962) ..... 13, 50

PAGE

*W. B. Coon Co.* v. *United Shoe Mach. Corp.*, W.D.N.Y., Civil No. 6841, dismissed April 12, 1963 ..... 25, 29

*Dresner* v. *City of Tallahassee*, 375 U. S. 136 (1963) 30

*Emich Motors Corp.* v. *General Motors Corp.*, 340 U. S. 558 (1951) *dismissal on remand aff'd* 229 F. 2d 714 (7th Cir. 1956) ..... 31

*England* v. *Louisiana State Bd. of Medical Examiners*, 375 U. S. 411 (1964) ..... 30

*Escobedo* v. *Illinois*, 378 U. S. 478 (1964) ..... 43

*Gelpcke* v. *City of Dubuque*, 68 U. S. 175 (1863) ..... 42

*Griffin* v. *California*, 380 U. S. 609 (1965) ..... 43

*Hanover Shoe, Inc.* v. *United Shoe Machinery Corp.*, 185 F. Supp. 826 (M. D. Pa.) *aff'd per curiam* 281 F.2d 481 (3d Cir. 1960), *cert. denied* 364 U. S. 901 7, 53

*Hartford-Empire Co.* v. *United States*, 323 U. S. 386 (1945) ..... 40

*Johnson* v. *New Jersey*, 384 U. S. 719 (1966) ..... 43

*Karseal Corp.* v. *Richfield Oil Corp.*, 221 F.2d 358 (9th Cir. 1955) ..... 33, 35

*Linkletter* v. *Walker*, 381 U. S. 618 (1965) ..... 43

*Lyons* v. *Westinghouse Elec. Corp.*, 235 F. Supp. 526 (S.D.N.Y. 1964) ..... 42

*Mapp.* v. *Ohio*, 367 U. S. 643 (1961) ..... 43

*Milwaukee Towne Corp.* v. *Loew's, Inc.*, 190 F.2d 561 (7th Cir. 1951), *cert. denied* 342 U. S. 909 ..... 52

*Miranda* v. *Arizona*, 384 U. S. 436 (1966) ..... 43

*Northwestern Oil Co.* v. *Socony-Vacuum Oil Co.*, 138 F.2d 967 (7th Cir. 1943), *cert. denied* 321 U. S. 792 57

*Ohio Valley Elec. Corp.* v. *General Elec. Co.*, 244 F. Supp. 914 (S.D.N.Y. 1965) ..... 57

*Peto* v. *Howell*, 101 F. 2d 353 (7th Cir. 1938) ..... 56

*Pfotzer* v. *Aqua Systems*, 162 F.2d 779 (2d Cir. 1947) ..... 56

PAGE

*Productive Inventions, Inc.* v. *Trico Prods. Corp.*, 224 F.2d 678 (2d Cir. 1955); *cert. denied* 350 U. S. 936 ..... 34

*Public Util. Dist. No. 1* v. *General Elec. Co.*, 230 F. Supp. 744 (W. D. Wash. 1964) ..... 57, 58

*Royster Drive-In Theatres, Inc.* v. *American Broadcasting-Paramount Theatres, Inc.*, 268 F.2d 246 2d Cir. 1959), *cert. denied* 361 U.S. 885 ..... 52

*Simpson* v. *Union Oil Co.*, 377 U. S. 13 (1964) ..... 12, 41

*Simpson* v. *Union Oil Co.*, 270 F. Supp. 754 (N.D. Cal. 1967) ..... 42

*Southern Pac. Co.* v. *Darnell-Taenzer Lumber Co.*, 245 U. S. 531 (1918) ..... 14, 54, 58

*Story Parchment Co.* v. *Paterson Parchment Co.*, 282 U. S. 555 (1931) ..... 56

*Straus* v. *Victor Talking Machine Co.*, 297 Fed. 791 (2d Cir. 1924) ..... 56

*Tehan* v. *United States ex rel. Shott*, 382 U. S. 406 (1966) ..... 43

*Thomsen* v. *Cayser*, 243 U. S. 66 (1917) ..... 56

*Twin Ports Oil Co.* v. *Pure Oil Co.*, 119 F.2d 747, (8th Cir. 1941), *cert. denied* 314 U. S. 644 ..... 57

*United States* v. *Aluminum Co. of America*, 148 F.2d 416 (2d Cir. 1945) ..... 41, 52, 53

*United States* v. *General Elec. Co.*, 272 U. S. 476 (1926) ..... 42

*United States* v. *United Shoe Mach. Co.*, 222 Fed. 349 (D. Mass. 1915), *aff'd* 247 U. S. 32 (1918) ..... 38, 39

*United States* v. *United Shoe Mach. Corp.*, 110 F. Supp. 295 (D. Mass. 1953), *aff'd per curiam* 347 U. S. 521 (1954) ..... 16, 19, 20, 22, 38, 62

*United States Gypsum Co.* v. *National Gypsum Co.*, 352 U. S. 457 (1957) ..... 26, 29

## STATUTES

PAGE

Clayton Act §5(a), 69 Stat. 283 (1955), 15 U.S.C. §16(a) ..... 11, 31, 34

Sherman Act §1, 26 Stat. 209 (1890), 15 U.S.C. §1 ..... 22

Sherman Act §2, 26 Stat. 209 (1890), as amended 69 Stat. 282 (1955), 15 U.S.C. §2 ..... 2, 15, 16, 21, 62

28 U.S.C. §1254 (3) ..... 27

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1967

No. 463

UNITED SHOE MACHINERY CORPORATION,
*Petitioner,*

v.

THE HANOVER SHOE, INC.,
*Respondent.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

## BRIEF OF RESPONDENT THE HANOVER SHOE, INC.

The Hanover Shoe, Inc. (hereinafter Hanover), plaintiff below and respondent herein, submits this answer to the Brief (hereinafter Un. Br.) submitted by United Shoe Machinery Corporation (hereinafter United), defendant below and petitioner herein.

### A. As to Questions Presented in Un. Br. 3-4.

In Point I E of its brief, pp. 41-43, United argues that Hanover was not within the "target area" of United's

monopolization. Hanover submits that this argument, rejected by both courts below, is not a "subsidiary question fairly comprised" in any of the questions presented in United's brief under Rule 40 1 (d) (1) of the Rules of this Court and that this Court should disregard it.

United, as was the case in the Court of Appeals, does not challenge as "clearly erroneous" under Rule 52(a) of the Federal Rules of Civil Procedure, any of the findings of fact by the District Court. This Court may, therefore, accept all such findings.

**B. As to Statement of the Case in Un. Br. 4-22.**

United's Statement of the Case in its brief, pp. 4-22, is more argumentative than factual.

1. As to section "1. The Parties and the Lease Transactions" Un. Br. 4-7. In place of this Hanover submits the following:

> This is an action for treble damages for violation of the antitrust laws in which Hanover, a shoe manufacturer, brought an action against United, a manufacturer of shoe machinery, to recover damages for injuries from violation of Section 2 of the Sherman Act through alleged monopolization of the shoe machinery industry and alleged monopolistic practices with respect to substantially all shoe machinery required and used by Hanover in the manufacture of men's welt shoes.
>
> After trial before the District Court without a jury the Court concluded that United had violated Section 2 of the Sherman Act. It found that, among other matters, United's market share ranged from 89% to 100% of the 20 major machine types, the rentals and royalties of which accounted for more than 80% of the charges

paid by Hanover to United.* It further found that United made its principal shoe machinery, including the 58 machine types leased by Hanover, available to shoe manufacturer customers only on lease and that as a result of the unlawful monopolization Hanover was required to pay more for leasing the shoe machinery it needed and used than it would have been required to pay had it been able to buy machinery in a free and competitive market and that Hanover was injured and sustained damage thereby (A. 106-107) 245 F. Supp. 298.

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* The finding of the District Court on evidence as of May, 1947, not challenged by United, is that:

"Of the 20 major machine types included in the 56, the rentals and royalties of which accounted for more than 80 percent of the charges Hanover paid United, United's market share was:

| | |
|---|---|
| 100% | 4 types |
| 99% | 6 types |
| 98% | 4 types |
| 97% | 3 types |
| 89—93% | 3 types |
| | 20 |

There is no evidence that United suffered any appreciable limitation in its share of the market with respect to these machine types prior to the filing of the complaint."

(A 34-35) (245 F.Supp. 265-266)

"As of about May, 1947, United's share of the market of 56 of the 58 lease-only machine types leased by Hanover—there being no data in evidence as to the remaining two—was as follows:

| | |
|---|---|
| 100% | 10 types |
| 99% | 14 types |
| 98% | 7 types |
| 97% | 4 types |
| 96% | 5 types |
| 90—95% | 9 types |
| 85—89% | 1 type |
| 80—84% | 3 types |
| 55—69% | 3 types |
| | 56" |

(A 34) (245 F.Supp. 265)

The District Court fixed the period of time for which Hanover might recover damages as July 1, 1939 through September 21, 1955 (A. 107) 245 F. Supp. 298-299. There is no dispute as to this (A. 97, fn. 15; A. 210-211) 245 F. Supp. 294 fn. 15; 377 F. 2d 790-791.* The District Court fixed the amount of Hanover's damage during this period of some 16 years as $1,413,203 (A. 166) 245 F. Supp. 302 and entered judgment for $4,239,609 after trebling (A. 180).

On appeal by United, the Court of Appeals vacated the judgment of the District Court as to damages and awarded a new trial limited to damages in accordance with the opinion of the Court (A. 217-218, A. 223-226) 377 F.2d 793.

The Court of Appeals held that the District Court had committed error:

(a) In failing to reduce the amount of the damages by the amount of the reduction in taxes that accrued to Hanover during the damage period by reason of leasing its shoe machinery from United rather than owning it, assuming it had a choice (A. 213-215) 377 F.2d 792-793; and

(b) In awarding damages to Hanover for the period July 1, 1939, the commencement of the applicable statute of limitations, through June 10, 1946, the date of the decision of this Court in *American Tobacco Co.* v. *United States*, 328 U.S. 781, (A. 203-209) 377 F.2d 787-790.

The foregoing are the only two points on which the Court of Appeals held against Hanover. These two points are raised and briefed by Hanover in No. 335.

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* The Court of Appeals held that the damage period ended not on September 21, 1955 but on June 1, 1955, the date on which "the unlawful lease-only policy had ended," (A. 211-212) 377 F.2d 776, 791. This was the effective date of the final decree in the Government case. Hanover makes no issue on this point.

Both courts below held for Hanover on all the points in United's petition in No. 463.

In this section United does no more than argue that since 1912 Hanover "benefited from and prospered under" United's leasing system, Un. Br. 5, that Hanover never "formulated" any claims until 1955, *ibid.*, that it used United's lease-only machines without protest, *ibid.*, and that it enjoyed advantages under the lease system and "prospered" under it, Un. Br. 6-7.

The answers to these claims are in the findings of the District Court of injury to Hanover causing damages in the amount of $1,413,203 (A. 166, 180) 245 F. Supp. 302, the findings as to Hanover's constant efforts to buy machinery and to persuade United to offer more of its machinery for sale, *see* pp. 48-50, *infra,* and in Hanover's substantial purchases of United machinery at the first opportunity following the availability of machinery for purchase under the terms of the final decree in the Government case (see pp. 49-50, *infra*). These findings stand unchallenged.

2. As to section "2. Decree in the Government Suit," Un. Br. 7-12.

Here United introduces the argument repeated and developed more fully under Argument I A, B, Un. Br. 27-33, and II, A (1), Un. Br. 43-46. Hanover makes its answer, *infra* pp. 15-23, 39-44.

We mention here only the extraordinary statement that Government counsel in argument before this Court in 1953 in the Government case "took the view we now urge as to that decree's recognizing the entire propriety of this lease-only system, and so represented to this Court," Un. Br. 11. Even the brief excerpts from the oral argument quoted in United's brief, pp. 11-12, point to no such conclusion. On

the contrary it is clear that Government counsel's answers to questions were entirely correct. The Government had never sought to prohibit leasing as such.

We have reviewed the transcript of argument and have, in Appendix A hereto, quoted a few excerpts from the arguments of Mr. Branch, counsel for United, and of Mr. Spritzer, counsel for the Government. Mr. Branch knew full well that lease-only was under attack. He said so. Mr. Spritzer did not abandon the Government's attack on lease-only. Rather he made clear that there was no objection to leasing as such, provided customers had an option to buy.

3. As to section "3. Treble Damage Litigation Arising out of the Government Decree," Un. Br. 13-14.

We do not understand the relevance of this section of United's Statement of the Case and Hanover will disregard it.

4. As to section "4. Hanover's Case," Un. Br. 14-22.

"(a) Passing-On Trial Before Goodrich, J.", Un. Br. 15-16.

United states the passing-on case as though the only claim before Judge Goodrich was Hanover's secondary claim of excessive lease costs, a claim that was held not to have been proven below (A. 55-57) 245 F. Supp. at 276. The fact is that Hanover's complaint makes an alternate claim — its primary claim below — of damages resulting from Hanover's being "prevented from acquiring shoe machinery, new or used, as owner either from United or elsewhere" (complaint par. 25(b), A. 19). It was on this claim that Hanover prevailed below (A. 106-107, 162-166) 245 F. Supp. at 298, 299.

"(b) Plenary Trial Before Sheridan, J." Un. Br. 16-17. Building on its earlier misstatement, United starts this

section with the wholly erroneous statement that at the trial, following the decision in the separate trial on the passing-on issue, Hanover "embarked upon an entirely different theory of damages," Un. Br. 16. This is simply not true. Two types of injury causing damage to Hanover were alleged in the complaint (complaint, par 25(a)(b), A. 19). Both were pressed at trial and while Hanover lost on one (A. 55-57) 245 F. Supp. at 276, it prevailed on the other (A. 106-107, 162-166) 245 F. Supp at 298, 299. Both were before Judge Goodrich and the Court of Appeals in the passing-on case.*

While United here refers to an "artificial figure constructed for the purpose, that is, a putative purchase price of leased machinery calculated . . . on assumptions provided by Hanover's counsel", Un. Br. 16, it carefully refrains from describing the calculations or the assumptions. In the interests of accuracy and completeness, even though United has raised no issue before this Court as to Hanover's theory of damages accepted by both courts below, we supply what United has hidden. In Appendix B hereto we set forth the detailed and precise findings of Judge Sheridan relating to each item involved in the damage calculation.

United attempts to state the 81 page decision of Judge Sheridan in the District Court below (A. 27-107) 245 F. Supp. 258-299, and his 17 page supplemental and amended findings and opinion (A. 162-178) 245 F. Supp. 299-308, in a few paragraphs on pages 16-17 of its brief. These 98 record pages of Judge Sheridan's findings and decision reflect a comprehensive and painstaking effort that cannot be briefly summarized. They reflect a scrupulous

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* *The Hanover Shoe, Inc.* v. *United Shoe Machinery Corporation*, 185 F.Supp. 826 (M. D. Pa.) *aff'd per curiam*, 281 F.2d 481 (3d Cir. 1960) *cert. den.* 364 U. S. 901 (1960) *rehearing den.* 364 U. S. 939 (1961).

regard for record facts and precision in making findings on all matters in issue. United has challenged none of these findings as clearly erroneous. The conclusions of law and opinion likewise deal in depth with all issues raised by United and Hanover.

In the Argument sections of this brief we state relevant findings and conclusions in the course of our answers to United's arguments.

"(c) Hearing Before Wyzanski, J., and Refusal of Sheridan, J. to Certify Question", Un. Br. 17-21.

This section is no more than an introduction to the argument made in Point I C, pp. 33-38 of United's brief. Hanover makes its answer *infra*, pp. 25-30.

United here makes much of its unsuccessful effort to persuade Judge Wyzanski to construe the final decree in the Government case in a manner agreeable to United. This Judge Wyzanski declined to do (A. 148-150). United now asks this Court to disregard not only Judge Wyzanski's decision but also the plain statement of Government counsel at the hearing before Judge Wyzanski:

"Miss Brass: Your Honor, I do not read the Court's decisions as being different or being opposed to what Judge Sheridan has ruled" (A. 142).

Hanover respectfully submits that this Court should disregard United's abortive attempt to secure a ruling from Judge Wyzanski and now, having failed to persuade this Court to attempt to discover what might have been in Judge Wyzanski's mind when he denied United's application.

The Government case was appealed to and decided by this Court and this Court did not merely affirm without opinion but held that "the findings are justified by the evidence and support the decree," 347 U. S. at 521. In the light of this holding no reason appears why this Court

should now ask Judge Sheridan to ask Judge Wyzanski what he did or did not have in the back of his mind when he made his findings and entered the decree twelve years before.

"(d) Court of Appeals Decision", Un. Br. 21-22.

The opinion and supplemental opinion of the Court of Appeals occupy 38 pages of the record (A. 185-222) 377 F. 2d 776-795, and are not faithfully summarized and stated in the two paragraphs United devotes to them.

We note once more that before the Court of Appeals United did not challenge as "clearly erroneous" any of the extensive findings of fact of the District Court. All of the findings survived scrutiny by the Court of Appeals. None was overturned.

## Summary of Argument

1. Answer to United Brief, Points 1 A and 1 B, pp. 27-33. United argues that its lease-only policy was not held to constitute monopolization in the Government case and that consequently the final decree in that case is not prima facie evidence of Hanover's claim of monopolization. Hanover answers that not only did it have other evidence of monopolization, as shown in the findings of the District Court below, but also that United's lease-only policy as practiced by it was in issue in the Government case in specific allegations of the complaint that were not controverted in United's answer, that the illegality of this pol was specifically adjudicated and that it was ordered t discontinued in the final decree. Both courts below so read the Government case and United's claim to the contrary is also contradicted by its own statements in its brief to this Court in the Government case. Its effort to attribute a

disclaimer of this position to Government counsel in argument to this Court is wholly without foundation in the excerpts of the argument of Government counsel quoted by it, and also in the arguments of United's own counsel, Appendix A.

2. Answer to United Brief, Point 1 C, pp. 33-38. United urges error in the denial of its motion by the District Court, made only after adverse decision by that court, to certify to the District Court for the District of Massachusetts, the court that had decided the Government case, questions as to the interpretation of the final decree entered by it in that case. The District Court below properly denied this motion, addressed to its discretion, as untimely and the Court of Appeals affirmed. United's motion was also untimely in relation to the proceedings prior to decision by the District Court below.

The issue as to the interpretation of the final decree in the Government case has been presented by United from the outset of this action. Whether timely or not, Hanover submits that there is no procedure under the Federal Rules of Civil Procedure or under federal practice that permits one District Court to seek the advice of another on a question of law that it is required to decide. The proper construction of a final decree entered by another District Court in an antitrust or other case presents no novel situation. No statute or rule or precedent exists for the procedure urged here by United and there was no error in denying United's belated application that lacked support, even if timely.

3. Answer to United's Brief, Point 1 D, pp. 38-41. United argues that a holding of illegality of United's lease-only policy in the Government case is no more than a possible

inference and that this is insufficient to make the final decree available to Hanover as "prima facie evidence" of monopolization under the Clayton Act. Hanover repeats the answer made under par. 1, above, that United's lease-only policy was squarely in issue and adjudicated to be illegal in the Government case. There is no question of possible inference, as United argues.

4. Answer to United's Brief, Point 1 E, pp. 41-43. United argues that only competing shoe manufacturers were within the "target area" of United's monopolization of shoe machinery and that Hanover, a shoe manufacturer, was not. Hanover answers that this point is not one of the seven questions presented in United's brief, pp. 3-4, nor fairly comprised within any one and should, therefore, be disregarded. In any event, both courts below were correct in holding that the aim of United's monopolization was wide enough to hit both competitors and customers and that no more direct injury could be inflicted than in the relation between a machinery monopolist and its customers, of which Hanover was one.

5. Answer to United's Brief, Points II A and II B, pp. 43-52. United tries to show that it would be "especially unjust" and "grossly unfair" to it to apply the adjudication of illegality of its lease-only policy in the Government case retroactively and thus permit Hanover to use it as evidence in support of its claim for damages. Hanover answers that it has met the requirements of the Clayton Act and is entitled to recover, that United has made no showing that requires that special treatment be given to its loss of the Government case, that United's lease-only policy was not in issue much less approved by this Court in any of the earlier antitrust decisions in which United

was defendant prior to the Government case. United complains that the Government case worked "a change in the law" that should not be applied retroactively, citing *Simpson* v. *Union Oil Co.*, 377 U.S. 13 (1964). There is no such change of law in the Government case. There is plainly no overruling decision nor is there in this record any showing of reliance by United on an earlier rule. United has cited no precedent that would justify consideration of its plea for special treatment in a treble damage action. It should be rejected and no special exception for United recognized to bar Hanover's statutory right to use the final decree in the Government case in support of its statutory claim for treble damages.

6. Answer to United Brief, Point III A, pp. 52-56 and Point IV, p. 61. United argues that both courts below erroneously disregarded "cost of capital" and that, if it had been considered, Hanover would never have bought shoe machinery if it could and also its damage calculations based on purchases would have been substantially reduced. "Cost of capital," as found by the District Court, is an economic concept defined as the rate of return expected by investors on capital funds placed at the disposal of a business concern. Hanover's answer to United is that the unchallenged findings below are that Hanover had ample funds to purchase machinery, that it would have purchased if machinery had been available, that it would have had to pay no more than the prime rate of 1½% or 2% on money borrowed, if it had borrowed, and that this interest cost was deducted from Hanover's damage calculations. It was held that "cost of capital," urged by United, was not a proper element of the damage calculations, that it was not an item of expense, that Hanover's only capital cost was the interest that was deducted and that Hanover

would have incurred no cost of capital over and beyond such interest.

7. Answer to United Brief, Point III B, pp. 57-60. United argues that Hanover's claim is barred because it failed to demand that United sell its lease-only machines. Hanover's president testified that demand would have been foolish and the courts below held, as a matter of law, that in the circumstances of Hanover's case, demand would have been idle and futile and was not required. The circumstances, among others, were that lease-only had been continuously used by United, that shoe manufacturers regarded themselves as captive customers of United, that Hanover took part in a futile trade association effort to persuade United to offer machinery for sale, that Hanover actively searched for non-United machinery available for purchase and that it bought from United as soon as United machinery was available for purchase under the final decree in the Government case. The decision of this Court in *Continental Ore Co.* v. *Union Carbide and Carbon Corp.*, 370 U.S. 690 (1962) is controlling; the law does not require an empty demand under a "rigid or mechanical formula."

8. Answer to United Brief Point IV B, pp. 61-66. United raises again the claim that Hanover, a shoe manufacturer, may not recover because any excess cost of machinery was "passed on" by Hanover to its shoe customers and was recouped by it in the sale price of the shoes. This "passing on" defense was separately tried and Hanover prevailed before both courts below and this Court denied certiorari. The issue is reopened in the grant of United's cross-petition. Hanover relies on the earlier decision in answering that the causal relation between United and

Hanover, its customer, is direct and obvious and that Hanover's injury occurred when it was required to pay cash out of pocket that it should not have been required to pay to secure shoe machinery. This is the direct and immediate effect of United's monopolization. The law, as stated in *Southern Pacific Co.* v. *Darnell-Taenzer Lumber Co.*, 245 U.S. 531 (1918), does not require going beyond "the first step" and holds a defendant liable "if proximately the plaintiff has suffered a loss," at 533-534. Hanover's case meets this in full. Decisions of this Court and of many lower courts support this rule.

United's claim of a "windfall" to Hanover was rejected by the Court of Appeals in the "passing on" case, and in two of the recent electrical cases. Evidently United wants a windfall for itself in retention of the monopolist's gains. Hanover seeks recovery for damage done to it by United's monopolization.

9. Answer to United's Brief, Point V, pp. 66-71. United argues that Hanover's cause of action directed at lease-only accrued when this United policy started in or about 1912 and that it is now outlawed. Hanover answers that the wrong of which it complains is United's continuing monopolization throughout the applicable period of limitations. The Court of Appeals in accepting Hanover's claimed right to recover "for the separate invasion of its rights which occurred within the period [of limitations]" added that "any other rule would be an affront to reason" (A. 222) 377 F. 2d at 795. Hanover submits that this is correct.

# ARGUMENT

## I.

**Answer to United Brief, Points IA and IB, pp. 27-33, that the decree, the opinion and findings of the District Court and the contentions of the parties in the Government case show that United's lease-only policy was not held to constitute monopolization.**

United commences its argument with the erroneous statement that Hanover relied "solely", Un. Br. 27, upon the final decree in the Government case to prove violation of Section 2 of the Sherman Act by United. The District Court correctly stated that Hanover relied "primarily" (A. 35) upon that decree and concluded on this point that "With the aid of the decree Hanover has proved a monopolization" (A. 49). There was other substantial evidence of monopolization.*

---

* Proof of United's market share in the Government case related to a period ending in 1947. Judge Sheridan below heard evidence regarding United's market position from 1947 until the filing of Hanover's complaint in 1955. He found that "There is no evidence that United suffered any appreciable limitation in its share of the market with respect to these [56 lease-only] machine types prior to the filing of the complaint [by Hanover] . . . Until 1955 United enjoyed an overwhelming share of the shoe machinery market which it controlled." (A. 35) 245 F. Supp. at 266. Judge Sheridan also found that "There was testimony that since the 1920's Hanover was actively engaged in a search to buy non-United Goodyear welt shoe machinery, . . . The search for machines was dormant shortly before and during World War II. Whenever shoemakers gathered, there was talk about the purchase of foreign machines after the war ended . . . .

"In 1949 the National Shoe Manufacturers Association (N.S.M.A.), of which Mr. Sheppard was president from 1946 through 1949 . . . formed a committee, with Mr. Sheppard as a member . . . to search for and disseminate information on modern non-United shoe machinery, to assist members in the evaluation of machinery, and to persuade United to offer more of its machinery for sale."

United compounds the first error with the further erroneous statement that it is essential to Hanover's case "that the decree constituted an adjudication that prior to the decree leasing as such by United was an antitrust violation", Un. Br. 27-28. Hanover has never made this contention. It is United's lease-only policy as practiced by it that Hanover attacks as unlawful and that, it submits, was in issue in the Government case, was adjudicated to be unlawful and was ordered to be discontinued in the final decree. United repeats its erroneous statement that Government counsel in argument before this Court "did not contend that lease-only constituted monopolization," Un. Br. 33. We refer to our comment on this contention, *supra*, pp. 5-6.

United's lease-only policy was put squarely in issue in specific allegations of the complaint and in the prayer for relief in the Government case.* The fact of lease-only was not controverted by United in its answer.**

---

(A. 65-66) 245 F. Supp. at 280. Again, "There is little evidence that major comparable non-United machines for use in the Goodyear welt process were available from United States manufacturers" (A. 71) 245 F. Supp. at 282, and "On the evidence in this case the conclusion is inescapable that there was 'very little suitable foreign machinery available and then only toward the end of the complaint period." (A. 78) 245 F. Supp. at 285. Indeed, "with very few exceptions, it is clear that no domestic non-United or foreign machines, comparable to United machines in capacity and performance, and for which there was service, parts and technical advice, were available to Hanover." (A. 79) 245 F. Supp. at 286.

* Complaint, *United States* v. *United Shoe Machinery Corporation*, Civil No. 7198, D. C. Mass., filed December 15, 1947 alleges, under Offenses Charged:

"27. Continuously from the year 1912 to the date of the filing of this complaint the defendant, United Shoe Machinery Corporation, has been violating Section 2 of the Sherman Act by:

(a) Monopolizing interstate trade and commerce in the shoe machinery industry of the United States;

(b) Monopolizing the manufacture and distribution in interstate commerce of all major shoe machines, except [listing machines not relevant here . . .]

* * *

"28. The defendant has attempted to monopolize and has monopolized the shoe machinery industry and the manufacture and distribution of shoe machinery, shoe machinery parts, shoe factory supplies, and tanning machinery, as hereinbefore alleged, by:

* * *

(c) Pursuing a manufacturing and marketing policy designed to prevent the installation in shoe factories of all competitive shoe machinery and to displace with United machinery all competitive shoe machinery installed in shoe factories;

* * *

"60. To forestall, restrict, and eliminate competition in the manufacture and distribution of shoe machinery United has continuously pursued a policy of (a) distributing most of its machinery upon leases which are intended to, and do, prevent shoe manufacturers from using competitive machinery; (b) adopting charges and other lease and sale terms for its machinery calculated to prevent the installation or cause the removal of competitive shoe machinery, and modifying said charges and terms for said purpose;

* * *

1. United's leasing policy

"61. For many years United has declined to sell most of its shoe machines and has made such machines available to shoe manufacturers only upon leases which reserve to United the sole and exclusive property in the machines and which grant to lessees the right to use the machines only for the purposes specified in the leases. United offers certain of its machines upon lease or sale terms at the option of shoe manufacturers but has followed the practice of establishing such alternative terms of sale and lease as will cause shoe manufacturers to lease such machines. As a consequence, most machines offered by United on optional terms are leased by shoe manufacturers.

"62. At present United offers on lease only all of its major machines, except sole cutting and certain leveling machines, . . ." (Paragraphs 61 and 62 are reprinted, A. 231-232)

* * *

EFFECTS OF THE VIOLATIONS OF LAW

"97. The aforesaid monopolization and attempts to monopolize and the acts, acquisitions, contracts, agreements, and understandings used in effectuation thereof, have had the following effects as intended by the defendant:

(a) The defendant controls and dominates the shoe machinery industry of the United States and has the power to exclude all others from said industry.

The District Court, in the Government case, in specific language in the section of its opinion on Alleged Violations, adjudicated the illegality of the policy:

> "Not only does the evidence show United has control of the market, but also the evidence does not show that the control is due entirely to excusable causes. The three principal sources of United's power have been the original constitution of the company, the superiority of United's products and services, and the leasing system. The first two of these are plainly beyond reproach. The original constitution of United in 1899 was judicially approved in United States v. United Shoe Machinery Company of New Jersey, 247 U. S. 32, 38 S. Ct. 473, 62 L. Ed. 968. It is no longer open to question, and must be regarded as protected

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(b) The defendant has the power arbitrarily to determine who may engage in the manufacture of shoes in the United States, the extent to which machinery shall be used in the manufacture of shoes in the United States, and the kinds of shoes which shall be manufactured in the United States.

* * *

PRAYER

"Wherefore, the plaintiff prays:

* * *

"6. That, upon the election of any lessee of the defendant and under such conditions and on such terms as the Court shall determine and order with due consideration for the rental and unit charges theretofore paid by said lessee to the defendant for the use of shoe machinery of the defendant, the defendant be required to sell to said lessee and divest itself of its entire right, title, claim, and interest to and in shoe machinery on lease to said lessee.

"7. That the defendant be required to offer to sell at reasonable prices all shoe machinery manufactured and commercialized by it and be enjoined from leasing shoe machinery except upon terms and conditions approved by the Court."

** To its answer to the complaint in the Government case United annexed exhibits containing lists of machines offered for sale only, Exhibit B; a list of machines offered for sale or lease (for monthly rental), Exhibit C; and three lists of machines offered for lease only, Exhibits D 1, D 2 and D 3, among which are all of the major important machines used by Hanover; *see* complaint pars. 7 through 13 and 16 (A 7-11, 12).

by the doctrine of *res judicata,* which is the equivalent of a legal license. Likewise beyond criticism is the high quality of United's products, its understanding of the techniques of shoemaking and the needs of shoe manufacturers, its efficient design and improvement of machines, and its prompt and knowledgeable service. These have illustrated in manifold ways that 'superior skill, foresight and industry' of which Judge Hand spoke in Aluminum, 148 F. 2d at page 430.

"But United's control does not rest solely on its original constitution, its ability, its research, or its economies of scale. There are other barriers to competition, and these barriers were erected by United's own business policies. Much of United's market power is traceable to the magnetic ties inherent in its system of leasing, and not selling, its more important machines. The lease-only system of distributing complicated machines has many 'partnership' aspects, and it has exclusionary features such as the 10-year term, the full capacity clause, the return charges, and the failure to segregate service charges from machine charges. Moreover, the leasing system has aided United in maintaining a pricing system which discriminates between machine types." *United States* v. *United Shoe Machinery Corp.,* 110 F. Supp. 295 at 344.

* * *

"In one sense, the leasing system and the miscellaneous activities just referred to (except United's purchases in the secondhand market) were natural and normal, for they were, in Judge Hand's words, 'honestly industrial'. 148 F. 2d at page 431. They are the sort of activities which would be engaged in by other honorable firms. And, to a large extent, the leasing practices conform to long-standing traditions in the shoe machinery business. Yet, they are not practices which can be properly described as the inevitable consequences of ability, natural forces, or law. They represent something more than the use of accessible resources, the process of invention and

innovation, and the employment of those techniques of employment, financing, production, and distribution, which a competitive society must foster. They are contracts, arrangements, and policies which, instead of encouraging competition based on pure merit, further the dominance of a particular firm. In this sense, they are unnatural barriers; they unnecessarily exclude actual and potential competition; they restrict a free market. While the law allows many enterprises to use such practices, the Sherman Act is now construed by superior courts to forbid the continuance of effective market control based in part upon such practices. Those courts hold that market control is inherently evil and constitutes a violation of §2 unless economically inevitable, or specifically authorized and regulated by law." (*Id.* at 344-345)

* * *

"It [United] has used its leases to monopolize the shoe machinery market. And if leasing continues without an alternative sales system, United will still be able to monopolize that market. To root out monopolization and to bring United, in the future, in the same class as its competitors, it is necessary not merely to place limitations upon United's leases, but also to require United to offer for sale any machine type which it leases. While, on its face, the decree seems to discriminate against United, in the context of the market situation created by United itself, the effect of the decree is to break down barriers erected by a monopolizer, so that, hereafter, there may be no wall between the class in which it is and the class in which its competitors are." (*Id.* at 350)

The lease-only system was clearly condemned.

Both courts below read the Government case this way (Court of Appeals, A. 198-203, 377 F.2d 785-787; District Court, A. 36-40, 46, 59-60, 245 F. Supp. 266-268, 271, 277). United's argument that the opinion in the Government case neither states nor implies that its lease-only policy

constituted monopolization, Un. Br. 30, pressed once more before this Court, is not even specious. Every bit of it is contradicted by the pleadings,* findings and adjudication in the Government case. And it is contradicted, as well, by United itself in its brief before this Court in the Government case:

> "The principal practices which the Court stressed were that defendant offered important complicated machines only for lease and not for sale and that defendant services the leased machines without a separate charge." *United States* v. *United Shoes Machinery Corporation*, U.S. Supreme Court Briefs, October Term 1953, No. 394, Potter's Antitrust News Service, p. 11.
>
> * * *
>
> "Evidently the Court regarded the fact that United distributes its more important machines only by lease and not by sale as the basic vice in the system." *Id.* at 32.
>
> * * *
>
> "Evidently the Court below regarded the fact that United distributes its more important machines only by lease and not by sale as the basic objection to the system." *Id.* at 66.

These statements were correct then and still are.

This is confirmed when we turn to the language of the final decree and not merely to the two paragraphs that United refers to in its brief, Un. Br. 28-29. The Final Decree adjudges in plain language in par. 2 that "Defendant violated § 2 of the Sherman Act, 15 U.S.C. § 2 by monopolizing the shoe machinery trade and commerce among the several States . . .", and then, as a part of the

* See footnote * pp. 16-18 supra.

relief, puts an end to the lease-only policy in decreeing in par. 5 that "After A Day* defendant shall not offer for lease any machine type, unless it also offers such type for sale." 110 F. Supp. 295, 352.

United relies on the last sentence in par. 2 that "The other charges of violation of the Sherman Act set forth in the complaint are dismissed with prejudice," Final Decree, 110 F. Supp. 295 at 352. The "other charges" of violation so dismissed clearly had to do with alleged violations of Section 1 and with alleged violations with respect to named shoe factory supplies and to tanning machinery.**

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* " 'A Day' means six months after entry of this Decree, unless, within the period allowed by law, an appeal shall be taken to the Supreme Court of the United States, in which event 'A Day' means six months after that Court sends its mandate to this Court."

** See the analysis of the complaint by the District Court in the Government case, 110 F. Supp. 295 at 298.

The District Court read paragraphs 27 and 28, the charging paragraphs of the 52 page complaint, to charge "a three-pronged attack, directed to shoe machinery [par. 27(a)-(d)], shoe factory supplies [par. 27e] and tanning machinery [par. 27(f)]," *id.* at 298.

While the principal findings related to shoe machinery the District Court made specific and separate findings as to shoe factory supplies, *id.* at 346 and tanning machinery, *ibid.*

The final decree in par. 1 defines "shoe machinery" to mean "all types of shoe machinery except dry thread sewing machinery," 110 F. Supp. at 352, and then proceeds in par. 2 to adjudge that "Defendant violated § 2 of the Sherman Act, 15 U.S.C.A. § 2, by monopolizing the shoe machinery trade and commerce among the several States," *ibid.* It seems to us that this adjudication covers the full scope of the attack directed to shoe machinery.

This is confirmed, we submit, by the treatment of the attack on "shoe factory supplies." Here the adjudication of monopolization in par. 2 covers only "tacks, nails, eyelets, grommets and hooks." In the last sentence of par. 2 the "other charges" are dismissed.

We submit that the "other charges" are charges as to "tanning machinery" and the other "shoe factory supplies" not specifically named in the adjudication of monopolization. This is entirely in keeping with the findings made that were against the Government as to tanning machinery and as to factory supplies other than those specifically mentioned in par. 2 of the final decree, *id.* at 352.

We submit that the adjudication on the charge of monopolization of the shoe machinery trade carries with it an adjudication of the specific charges as to the lease-only system as practiced by United.

United does not advance its argument by ascribing to Judge Wyzanski the purpose "in directing United to sell as well as lease * * * 'gradually [to] weaken the prohibited market power which [United] now exercises'," Un. Br. 30. Judge Wyzanski in the quoted language was commenting that one of the effects of the sale requirement would be creation of a second-hand market and, he added, "From that market, United will face a type of substitute competition which will gradually weaken the prohibited market power which it now exercises", 110 F. Supp. 350. That, we submit, is far different from a statement of the purpose the District Court had in mind in directing sales as well as leases of machinery, Un. Br. 30. Blending this distortion with the well known rule that relief may go beyond the limits of proven violation—United cites seven cases—United argues that it was fallacious for the courts below to conclude from the future prohibition of sales that the lease-only policy had been condemned, Un. Br. 31. United thereby takes a sentence out of context and completely disregards the specific holdings in the Government case which we have noted, *supra*, pages 16-22. In so far as the cases United cites enunciate the rule mentioned, they differ from the instant case in that the courts there clearly recognized and made explicit that the relief ordered went beyond the violations charged. No such element is present in the Government case.

Although United itself in 1953 correctly stated to this Court that lease-only was regarded in the Government case "as the basic objection to the system," it now seeks

to impose a contrary view on counsel for the United States. No such contrary view is reflected in the colloquy in the course of oral argument on April 26 and 27, 1954 referred to by United, Un. Br. 11-12, 33. (See pp. 5-6, *supra*, and Appendix A). The colloquy obviously relates to leasing as such. The disavowal by Government counsel is of an attack on leasing, not of an attack on lease-only. The difference is one of substance.

In the Government action the Government did not seek to abolish leasing:

> "The Government does not propose that United should cease leasing machines. It does suggest that this Court order defendant to eliminate from the leases those provisions found to be restrictive, to offer for sale every type of machine which it offers for lease, and to make the sales terms somewhat more advantageous to customers, than the lease terms." (110 F. Supp. at 348-349).

The District Court in the Government case did not condemn leasing as violative of the law. Hanover has never contended that it did. What was prohibited in the final decree, among many other matters, was the lease-only policy as practiced by United. That was what the Government attacked, among many other matters. That was what the District Court condemned in that case, among many other matters. That was what Paragraph 5 of the decree explicitly prohibited, 110 F. Supp. 295 at 352.

When Government counsel was insisting that the Government was not asking that "leasing be prohibited" he was surely not abandoning the portion of the final decree that he was defending! His argument was to the contrary.

We submit, again, that both courts below were correct in their view that lease-only as practiced by United was condemned as an unlawful means of monopolization in the Government case.

Next, United declares, Un. Br. 32-33, that no other court has interpreted the final decree in the Government case to mean that lease-only as practiced by United was a violation. Apart from both courts below, only one District Court has had the question squarely before it. That case, *W. B. Coon Co.* v. *United Shoe Machinery Corp.*, unreported, Civil No. 6841 (W.D.N.Y.) April 12, 1963 (A. 267) is no more than a case of failure of proof by a bankrupt plaintiff in a trial that lasted less than a day. It was correctly ignored by the Court of Appeals and put aside by the District Court, see p. 29, *infra*.

*Cole* v. *Hughes Tool Co.*, 215 F.2d 924 (10th Cir. 1954) *cert. den.* 348 U.S. 927 (1955) is of little aid to United because there Hughes Tool Co.'s lease-only policy was operative in a healthy competitive market and had no exclusionary effect or anti-competitive purpose and retention of ownership was justified in the interest of research activities connected with the leased equipment. We repeat that it was the lease-only system as practiced by United, together with its role in perpetuating an overwhelming dominance of the market that was condemned in the Government case.

## II.

**Answer to United Brief, Point IC, pp. 33-38, that refusal by the District Court below to certify to the Massachusetts District Court questions of construction of the final decree in the Government case was an abuse of discretion.**

United claims error in the denial of its motion before the District Court below for certification to the District Court for the District of Massachusetts of questions as to the interpretation of the final decree entered by that Court on February 18, 1953 in the Government case. (A. 173-178)

245 F. Supp. at 305. The denial of this motion was affirmed by the Court of Appeals below (A. 209-210) 377 F.2d at 790.

The decisions below on this motion were correct.

United's motion was not timely after the adverse decision of the District Court below. The Court of Appeals correctly described the motion as addressed to the discretion of the District Court and held that "in view of the untimeliness of the request for certification, its denial by the court below was not an abuse of discretion" (A. 210) 377 F.2d at 790. The District Court referred to the request as having been made "belatedly" (A. 176) 245 F. Supp. at 307.

United in its brief has not presented grounds to show any abuse of discretion that calls for intervention by this Court. United talks about a delay of six weeks, Un. Br. 37. Rather its delay was one of years. The question of the construction of the final decree in the Government case was presented in this case from the outset. United contended throughout that this final decree had not adjudicated the illegality of United's lease-only policy and that it was not, therefore, prima facie evidence in support of Hanover's claim. Hanover at all times took a contrary view, as it does now before this Court. United now asserts that this issue presented "the pivotal question", Un. Br. 34, yet United took no step until that question had been decided adversely to it.

United had a choice. It might have, at an early stage in proceedings before the District Court, sought a stay of further proceedings before that court, while it made application to the District Court in Massachusetts for a construction of the final decree. See *United States Gypsum Co. v. National Gypsum Co.*, 352 U.S. 457, 462 fn. 14 (1957) as to stay procedure in a situation different from the Hanover case. Such an application could not have been denied as untimely whatever other difficulties it presented. The chief

difficulty of even a timely motion for certification of a question to another federal District Court would surely be that such a procedure is unknown to the Federal Rules of Civil Procedure* or to federal practice. Even if such a novel procedure had been undertaken by United, the District Court in Pennsylvania would scarcely be bound by the views, whatever they might be, of the District Court in Massachusetts. It was the duty of the District Court in Pennsylvania to decide the case that was properly before it and it can surely not be found to have erred in failing to seek the advice of another District Court on one of the points, however important, that was before it.

United, however, chose to await the decision of the District Court. Then, when confronted with an adverse decision, it took action.

Hanover submits that the request is now clearly "untimely." In any event, even if it had been timely, it was no error to deny this novel application on the merits. It is not an appropriate task of District Courts to seek advice from each other and a procedure to accomplish this is unknown to our federal judicial system.

United contends that the "need" for certification might never have arisen because United might have prevailed. But in that event one must suppose that Hanover in its turn would have felt a "need" for a different decision and, if United's view of the law is correct, Hanover, too, could have demanded that Judge Sheridan recant and certify. United simply argues for a rule that would give the loser in private antitrust litigation two chances to persuade. If it loses before one District Court it is to be given another chance before another District Court. We

* The only certification procedure between courts in the federal system is the certification of questions by a court of appeals to the Supreme Court under Judicial Code § 1254 (3).

regard this as offensive to orderly judicial procedure and as no more than an effort by United to lift itself by its own bootstraps in an effort to create a procedure where none exists. If anything it is an argument against creation of such a procedure, at least in the situation here presented.

We submit that there was no abuse of discretion by the courts below in denying certification to United.

In any event, the District Court, after full argument, properly exercised its discretion in denying the motion.

(a) The District Court stated in its supplemental opinion that United's various contentions as to the interpretation of the final decree in the Government case had all been "urged upon and considered by this court prior to its decision" (A. 174) 245 F. Supp. at 306.

(b) The District Court in the same supplemental opinion again stated its view of the decision in the Government case:

> "This court found that in the Government case the court held that United had monopolized trade in shoe machinery during the statutory period; and that the lease-only system was a monopolistic practice by the aid of which United maintained its monopolistic position. This court then concluded that United had a duty to abandon that policy or, to put it in another way, to refrain from illegal trade practices" (A. 174) 245 F. Supp. at 306.

and referred to the extended discussion of this point in its original opinion (fn. 22, A. 174) 245 F. Supp. at 306.

The District Court concluded that "there is nothing in the decree itself which compels a different conclusion" (A. 174) 245 F. Supp. at 306.

(c) United makes much of an application it made directly to the District Court for the District of Massachusetts, prior to its motion below, for construction of the final decree and

of remarks made by Judge Wyzanski in denying that application at a hearing on May 28, 1965.* Since the application was denied (A. 148-150), the District Court below might properly have put aside the transcript of the colloquy and not joined with United in its effort to discern what Judge Wyzanski's unexpressed thinking might have been.

Judge Sheridan below, however, joined in the search and found nothing in the colloquy "to cause this court to change its construction of the decree or to certify questions regarding its construction to the District of Massachusetts" (A. 176) 245 F. Supp. 258 at 307.

United finds the decision below denying certification to be "in square conflict" with this Court's holding in *United States Gypsum Co.* v. *National Gypsum Co.*, 352 U. S. 457, 463-64, Un. Br. 34. That case, however, did not involve certification but rather the exercise of power by the court that had entered an antitrust decree under the jurisdiction retained by it in the decree, 352 U. S. at 463. It is hard to understand how this has any bearing on the issue here which involves no more than the power of the District Court below to construe the final decree entered in Massachusetts.

United next urges that there is conflict between the construction given to the final decree by the District Court below and by the District Court for the Western District of New York in *W. B. Coon Co.* v. *United Shoe Machinery Corp.*, unreported, Civil No. 6841, (W. D. N. Y.) April 12, 1963 (A. 267). As already mentioned, *supra* p. 25, that case involved no more than a failure of proof by a bankrupt plaintiff in a trial lasting less than a day. Judge

* United fails to mention that, when Judge Wyzanski denied its application, he said:

"In the first place, this application comes rather late with respect to the particular Hanover Shoe Company litigation and also with respect to other litigation raising many of the same questions." (A. 149)

Sheridan correctly put aside the *Coon* case in his Supplemental Opinion, pointing out that the deficiencies in proof in the *Coon* case had been supplied in Hanover's case.*

Finally, United seeks support for its argument in the limited availability under statutes of a few states of certification of state law questions by federal appellate courts to state courts, Un. Br. 35. Statutory law in Florida and in a few other states authorizes courts of the state to answer federally certified questions. Three of the cases cited by United, Un. Br. 35, involved certification pursuant to a Florida statute authorizing such procedure.** The fourth case*** was one in which a federal court had abstained from decision of a state law question and had directed that action be brought in a state court.

Obviously the few state statutes that permit this procedure are no support for United's effort to create such a power within our federal judicial system. United's *ipse dixit* is no substitute for statute or rule or precedent and none of these exists.

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* "A review of the findings of fact in that case show Coon failed to introduce evidence that it would have purchased machines; that it had the means to do so; that it was dissatisfied with the leasing system; that United's acts caused damage to Coon; that lease prices were excessive; and that computed purchase prices and adjustments would have resulted in a fair and reasonable damage computation. Hanover's recovery is not based on excessive returns to United, and the other deficiencies in proof in the Coon case have been supplied." Supplemental and Amended Findings of Fact, Conclusions of Law and Opinion, as Amended (A. 178) 245 F. Supp. at 307-308.

** *Aldrich* v. *Aldrich*, 375 U. S. 75 and 249 (1963), certification by Supreme Court to Supreme Court of Florida; *Dresner* v. *City of Tallahassee*, 375 U. S. 136 (1963), same; *Clay* v. *Sun Insurance Office Ltd.*, 363 U. S. 207 (1960), same.

*** *England* v. *Louisiana State Board of Medical Examiners*, 375 U. S. 411 (1964).

## III.

**Answer to United Brief, Point ID, pp. 38-41, that Clayton Act §5(a) gives prima facie effect only to "findings made expressly or by necessary implication in the Government case" and excludes making "lease-only a violation by inference."**

Here United argues that before Hanover may rely upon the final decree in the Government case as part of its proof of monopolization "it must establish that the decree and essential findings expressly or by necessary implication hold United's lease-only policy to be monopolization," Un. Br. 40. United adds that it is not enough that "illegality of the lease-only policy is a possible inference from the auxiliary findings in the Government suit," *ibid.*

Whatever may be the significance of these statements, the fact is that there is here no reliance by Hanover on possible inferences, etc. The statute makes the final decree "prima facie evidence." The findings and final decree are explicit and conclusive.

Hanover submits that, as this Court stated in *Emich Motors Corp.* v *General Motors Corp.*, 340 U. S. 558 (1951), it is the task of the treble damage court "to make clear *** the issues that were determined against the defendant in the prior suit," *id.* at 571. In a Government criminal case tried before a jury there are no findings of fact and in such a case the later treble damage court, as in *Emich*, may resort to "portions of the record, including the pleadings and judgment, in the antecedent case as he may find necessary or appropriate to use in presenting to the jury a clear picture of the issues decided there and relevant to the case on trial," *id.* at 571-572.

Where, as here, the treble damage court had before it comprehensive findings of fact and conclusions in the Government case tried before the court without a jury, it may, of course, review those findings and conclusions to secure "a clear picture of the issues decided there and relevant to the case on trial" (*id.* at 572).

Judge Sheridan in the District Court below and the Court of Appeals examined at length the findings, conclusions and decree in the Government case. (A. 35-49, 196-203) 245 F. Supp. at 266-272, 377 F.2d at 784-787. The Court of Appeals referred to the important policy of the Clayton Act, § 5a to lighten the burden on private antitrust plaintiffs and added that "It is in harmony with that policy to give prima facie effect to any fact which the findings or the opinion fairly show was actually adjudicated in the Government case." (A. 197-198) 377 F.2d at 784.

The pleadings and findings give point and substance to the terms of the final decree. When these are examined it becomes explicit that United's lease-only policy was put in issue and adjudicated in the Government case and that the final decree was designed to prohibit the continuance of that policy. We do not repeat here our discussion of these points, *supra* pp. 16-23.

## IV.

**Answer to United Brief, Point IE, pp. 41-43, that Hanover was not within the "target area" of United's violation and may not, therefore, rely upon the final decree in the Government case.**

Here United argues that Hanover was not within the "target area" of the violations of law found in the Government case. The argument is that United's violations "hampered United's competitors" and did not injure Han-

over or other shoe manufacturers, Un. Br. 41. It follows, United argues, that the final decree in the Government case may not be used by Hanover in support of its claim.

Hanover submits that the "target area" point is not one of the questions presented by United nor is it "fairly comprised" as a "subsidiary question" in any of the questions presented within Rule 40 1 (d) (1) of the Rules of this Court. We submit that this Court should, therefore, disregard this "target area" point.

Nonetheless, we present our answer in the event that this Court should deem this point to be properly before it.

Both courts below ruled against United on this point and stated reasons that we submit have not been overcome in United's brief. The District Court met United's argument that only competing shoe machinery manufacturers were within the target area of United's monopolization by pointing out that:

> "The stifling of the business of competing shoe machinery manufacturers was a direct object of United's actions, but it was not the only object. It permitted United to deal with shoe manufacturers on United's terms, and the terms in turn permitted United to stifle the competition. The monopolistic terms, such as the lease-only system and the related clauses and practices, caused both the injury claimed by Hanover and the injury to United's competitors. There is nothing strange about an actor having more than one immediate object of his acts. The aim was wide enough to accomplish both. Hanover was 'aimed' at and 'hit,' the test of Karseal"* (A. 54) 245 F. Supp. at 275.

The Court of Appeals reached the same conclusion:

> "Here, . . ., the cost to the customer of doing business was increased as a result of the monopolist's conduct.

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* The reference is to *Karseal Corp.* v. *Richfield Oil Corp.*, 221 F.2d 358 (9th Cir. 1955) which we discuss *infra* fn.* pp. 34-35.

> The consequences of the injury therefore were direct and the cause of action under the narrowest construction of § 4 was made out. In the context of the relation of machinery monopolist and customer manufacturer no more direct injury could be inflicted" (A. 196) 377 F.2d at 783-784.

It is hard to find a more direct business relationship than that between manufacturer and customer. Hanover, the customer, has proved injury by the machinery monopolist. It is hard to know what more is to be expected of it.

Both courts below relied upon *Chattanooga Foundry and Pipe Works* v. *City of Atlanta*, 203 U.S. 390 (1906). In that case plaintiff City of Atlanta purchased pipe at an excessive price due to an illegal agreement between defendant and others. In that case, as in Hanover's case, the damages sought were the higher business costs resulting from the violation of the antitrust laws. The District Court held that "the cases cannot be distinguished" (A. 51-52) 245 F. Supp at 274 and the Court of Appeals agreed (A. 196) 377 F.2d at 783.

The cases principally relied upon by United are wide of the mark.*

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* In *Conference of Studio Unions* v. *Loew's, Inc.*, 193 F.2d 51 (9th Cir. 1951), *cert. denied*, 342 U. S. 919 (1952), Un. Br. p. 41, plaintiff union and its individual members sought to recover damages from a group of motion picture producers and a rival union resulting from an alleged conspiracy on the part of the defendants to injure independent producers, not parties to the litigation. The basis of the claim was that the injury to the independent producers resulted in a loss of revenue to the plaintiff unions and of wages to the individual plaintiffs. Recovery was denied on the ground that the alleged injuries were incidental and remote. It is hard to understand how the relation between Hanover and United could be more direct.

In *Productive Inventions, Inc.* v. *Trico Products Corporation*, 224 F.2d 678 (2d Cir. 1955), *cert. denied*, 350 U. S. 936 (1956), Un. Br. p. 42, a patentee was held not to be a person injured in his business or property in an action he had brought against a competitor of his exclusive licensee, claiming treble damages against the competitor for loss of royalties on sales that might have been made

United argues that "United's leases had an exclusionary impact only upon United's competitors, . . . derived largely from the benefits they conferred on United's customers, the lessees . . ." Un. Br. 42. If so, we submit that this enabled the monopolist to attain and maintain its position and to enjoy that position in relation to its customers. If a customer, such as Hanover, can prove injury, as it has, it is hard to understand what more it must do.

It is not true, however, that United conducted its monopoly for the benefit of shoe manufacturers. United's attempt to read the Government case as putting "Hanover, like other shoe manufacturers . . . outside the ambit of the violations found . . ." Un. Br. 42 is answered by the District Court in holding that:

> ". . . Hanover's injury flows proximately from the monopolization. The complaint in the Government case listed the effects of the monopolistic practices on the shoe manufacturers, as well as on United's competitors.

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by the exclusive licensee save for the competitor's alleged antitrust violations. The patentee's antitrust complaint was dismissed. This decision has no bearing on the present case where the relations between the parties and the damage suffered by Hanover are both as direct as anything can be.

*Karseal Corp.* v. *Richfield Oil Corp.*, 221 F.2nd 358 (9th Cir. 1955), Un. Br. p. 42 did not involve the customer relationship present here. It involved, rather, an action by a manufacturer against a competing manufacturer. Richfield, the defendant manufacturer, had applied restraints to capture the independent gas station market. Plaintiff Karseal, on the other hand, sold its products to distributors while defendant Richfield sold direct to the independent gas stations. It was held that this was immaterial. Karseal was within the target area. It was "aimed at" and "hit," regardless of its different marketing method. The question was whether the manufacturer of a product, who himself did not sell direct to gas station customers but sold to distributors who might sell to such customers, was also within the target area and it was held that he was.

It is hard to understand why United cites *Karseal* in support of its position. Here the relationship between manufacturer and customer is more direct than between competitors in *Karseal*.

> One of the effects on the lessees was United's extraction of large sums of money in excess of the reasonable value of machinery and of the service rendered by United. A similar charge is included in Hanover's complaint. Judge Wyzanski found that United's policies have '. . . not necessarily promoted in the *shoe manufacturing* field the goals of a competitive economy and an open society.' He pointed out that if United shoe machinery were available on a sale basis, United's psychological and economic control over shoe manufacturers would be released, which in turn would cause some shoe manufacturers, for financial and psychological reasons, to be more willing to dispose of United's machines and take on either competitors' machines or United machinery available in a secondhand market. It is obvious that the financial considerations were that some manufacturers would find it less costly to own than to lease machinery. Thus, a charge and finding of detriment to a particular class of person, as seemingly required by Eagle Lion Studios, is present" (A. 53-54) 245 F. Supp. at 274.

Further:

> "It is clear that a shoe manufacturer is '. . . within that area of the economy which is endangered by a breakdown of competitive conditions . . .' in the shoe machinery industry" (A. 54) 245 F. Supp. at 275.

The Court of Appeals agreed (A. 196) 377 F.2d at 783-784.

It is difficult, we submit, to imagine any group that could be more directly affected by United's monopolization than its customers, of which Hanover was one.

That there was ample basis for these conclusions of the Courts below is apparent from the detailed findings of the District Court in the Government action as to the effects produced on shoe manufacturers by United's lease-only monopolization, 110 F. Supp. at 323-325.

## V.

**Answer to United Brief, Points II A and II B, pp. 43-52, that it would be "especially unjust" and "grossly unfair" to United to apply the Government case retroactively.**

Under this Point II United takes on what, we submit, must be a heavy burden to show that a decision of this Court should be given anything but the full application given to other decisions. We would put decisions under the Sherman Act in no special category. We submit that United has fallen far short of making a showing that warrants special treatment for it through departure by this Court from its regular practice in antitrust cases. This point has special emphasis where, as here, a special treatment of the decision of this Court in the Government case would bar application of the remedy provided by Congress to one injured in his business.

The thread that runs through this section of United's brief is that it would be "especially unjust" and "grossly unfair," Un. Br. 49, 52, to subject United to treble damages. This plea is made to escape liability and to permit United to retain its gains by barring recovery by a private party who has met the requirements of the Clayton Act of proof of violation of the Sherman Act and of injury. No precedent is cited in which a plea of this kind has been recognized as relevant and appropriate. On its face United's plea is suspect. Hanover submits that it should be rejected.

First, United tries to show that this Court "had approved the features of United's leases which the Government suit attacked," Un. Br. 43. The answer to this plea, a plea

not accepted in the Government case,* is that in not one of the three earlier cases relied on by United was the lease-only policy in issue. United misleads when it refers to "this Court's approval of its lease-only policy," as it does in Un. Br. 47.

It is simply not true that of the three United cases which reached this Court prior to the Government case "only the second dealt with the lease-only policy" and "that case upheld the policy," Un. Br. 46. This statement is not only untrue but is contradicted by the correct statement on p. 44 of its brief that the District Court in the second case** stated that "the Government had abandoned during the trial its contention that the lease-only policy itself was unlawful."

United follows this, Un. Br. 45, with an excerpt from the opinion of this Court in the second case that is misleading because United has omitted words that, if included, would have wholly changed the meaning. United quotes and italicizes the words, *"The evidence disproves this,"* implying by relating them to the preceding words that they refer to United's leases. The omitted words show that "this"

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* In its answer in the Government case, *United States* v. *United Shoe Machinery Corporation,* 110 F. Supp. 295 (1953) United pleaded the second decision as "a complete defense in bar" to the Government action and the third decision as a partial bar. See Answer of United in Government case, Third Defense pp. 64-69, and Fourth Defense *id.* pp. 69-74. The District Court in the Government case does not seem to have mentioned these pleas in its lengthy opinion. On the argument before this Court United abandoned them, as is shown in the following colloquy:

"Justice Reed: I am a little uncertain as to just why you refer so frequently to former decisions. Of course you are not claiming those are res adjudicata.

"Mr. Proctor: No, sir."

Transcript of oral argument in *United Shoe Machinery Corporation* v. *United States*, October Term 1953, No. 394, p. 25.

** *United States* v. *United Shoe Machinery Co.*, 222 Fed. 349, 352 (D. Mass. 1915).

refers to the immediately preceding words that ". . . the restraint is said to have been the initial conception of the company and the purpose of its organization."* That is quite different from the impression United seeks to convey as to what this Court said in this decision.

In Hanover's brief in No. 335, pp. 33-37, we show that United's long standing exclusionary lease-only policy and practice "was not in issue in any of the cases until the United States filed its complaint in the Government case in 1947." In the Government case, as we point out pp. 16-23 *supra*, lease-only was put in issue in the complaint, was adjudicated as illegal and was ordered to be discontinued in the final decree. It is this final decree that Hanover relies upon as prima facie evidence of monopolization. This evidence is in no way weakened by the earlier second case in which lease-only was not in issue.

United makes a further argument that we do not comprehend. It refers, Un. Br. 46, to the third case and again states correctly that the Government did not attack the lease-only policy in that case. United then adds that ". . . the district court . . . held the full-capacity clause, among other provisions, lawful, thereby necessarily upholding the

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*The full quotation is as follows with the omitted words in brackets:

"The evil potency ascribed to the leases (we use the word as inclusive of the clauses and we do not think it necessary to distinguish them according to their application to particular machines) by the Government is their asserted coercion of shoe makers and machinery makers. They limit the freedom of the first, it is contended, and by that limitation preclude the competition of the second with the defendants. [In other words, the use of the machines of the United Company is compelled as against the use of machines of other manufacturers, resulting in the restraint of the trade of the latter. To this charge all other charges are subsidiary, and the restraint is said to have been the initial conception of the company and the purpose of its organization.] The evidence disproves this. . . ." *United States* v. *United Shoe Machinery Co.*, 247 U. S. 32 at 63 (1918).

lease-only policy." * We are unable to follow such a palpable non sequitur.

Much the same argument is made, Un. Br. 45, with respect to the second case. It is there said that ". . . approval of the clauses necessarily implies approval of the lease-only policy since it would be unnecessary to consider specific clauses if lease-only as such were illegal." The action of the District Court in the Government case furnishes a complete answer. It found it necessary to deal with both the issue of lease-only and the restrictive clauses and practices that were attacked, 110 F. Supp. 295 at 344. By its order, it purged the leases of their restrictive features, *id.* at 349, final decree par. 6, *id.* at 352 and ordered that United "shall not offer for lease any machine type, unless it also offers such type for sale," *id.* par. 5 at 352.

United follows the above argument with an oblique suggestion that, under *Hartford-Empire Co.* v. *United States*, 323 U.S. 386, page 412, fn. 10 (1945), a lease of a patented machine is a lawful method of exercising a patent right. Again, we do not understand this argument because the District Court in the Government case found, as to United's patents:

> "It is, however, plain that most of the patents on the fundamental inventions have expired, and that most existing patents do not technically prevent the accomplishment of the same result in another way. Thus, it is clear that United's present dominance does not rest primarily on patents." 110 F. Supp. 295 at 333.

Surely, in the face of this finding, United may no longer contend that lease-only is in some way justified under its

* We have pointed out in our brief in No. 335, pp. 37-38, that (a) in the third case the full-capacity was upheld on its face without any inquiry as to how it was used by United and (b) in the Government action it was found to have been used by United with anti-competitive effects.

patent position. The finding quoted above is clear enough that United no longer has any such position.

In this section and elsewhere in its brief United conveniently confuses lease-only with provisions in the leases. To purge or not to purge a lease of restrictive clauses is surely not the same as dealing with a lease-only policy. Lease-only gives full effect to the operation of the restrictive clauses and is the cement that binds together the violation.

If only the restrictive provisions and policies were violative of the law, all the Court need do would be to strike them but, as United's counsel recognized in its argument in this Court in the Government case, supra p. 6, App. A pp. 1a-2a, it was also the lease-only policy which the Government case attacked and which the decree therein abolished with the approval of this Court.

Next, Un. Br. 46-48, United builds on its previous point that this Court had already approved its lease-only policy at the time of the decision of this Court in *American Tobacco Co.* v. *United States*, 328 U.S. 781 in 1946. United then argues that, due to this claimed earlier approval, the decisions in the *Alcoa** and *American Tobacco* cases gave to United no fair warning that the earlier approval had been undermined. Hanover reiterates that United's lease-only policy was not in issue and thus had not been approved by this Court in any of the three earlier decisions.

In its final plea, United complains of the retroactive application of "a change in the law," Un. Br. 49, and attempts to support its argument by reference to decisions such as *Simpson* v. *Union Oil Co.*, 377 U.S. 13 (1964), to overruling decisions and to situations of reliance on an earlier rule.

In Hanover's brief in No. 335, pp. 31-32, we discuss the inapplicability of the decision in *Simpson* which was a case of a clear change of a rule. At pp. 27-31 of that brief we show that no new rule of antitrust law was announced in

* *United States* v. *Aluminum Co. of America*, 148 F.2d 416 (2d Cir. 1945).

the decision of this Court in *American Tobacco Co.* v. *United States*, 328 U.S. 781 (1946). We point out that United, with a market share ranging from 89% to 100% of the 20 major machine types in the shoe machinery trade combined with its long standing exclusionary lease-only policy and the restrictive provisions of its leases was on ample notice, under antitrust decisions of this Court long antedating the commencement of the period of the applicable statute of limitations and long antedating the 1946 decision in *American Tobacco*, that its antitrust position was, to understate it, precarious and exposed to attack.

There are no overruling decisions in Hanover's case, as United argues, Un. Br. pp. 50-51.

There can be no claim here of "reliance" by United upon some earlier rule of law. There is not a scrap of evidence in this record on that point. There is no claim in this record of reliance by United on counsel,* such as there was in the testimony of counsel in *Simpson* v. *Union Oil Co.*, 270 F. Supp. 754 (N.D. Cal. 1967) and in the finding of reliance for 30 years on the earlier *General Electric* decision of 1926, 272 U.S. 476 in *Lyons* v. *Westinghouse Electric Corp.*, 235 F. Supp. 526, 535-536 (S.D.N.Y. 1964).

A decision such as *Gelpcke* v. *City of Dubuque*, 68 U. S. 175 (1863), Un. Br. 51, is wide of the mark. There an overruling state decision would have invalidated bonds issued and purchased in reliance upon the overruled decision. There is no overruling decision in Hanover's case. There is not even "a new rule of antitrust law" that caught United unawares in 1946.

United makes much of recent decisions of this Court in criminal cases in which newly announced constitutional rules were denied retroactive application. It seeks support in these decisions to limit the 1955 decision of this Court in the Government case to prospective application only.

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* On the contrary, as shown in the colloquy quoted in footnote * p. 38 *supra*, United's counsel disclaimed any such "reliance" more than thirteen years ago.

We see no need for a detailed analysis of the three recent constitutional decisions, principally relied on by United, Un. Br. 50-51.

First, *Johnson* v. *New Jersey,* 384 U.S. 719, 728 (1966), Un. Br. 50, in which this Court declined to apply retroactively either the rule of *Escobedo* v. *Illinois,* 378 U.S. 478 (1964) that a confession given after an accused person has unsuccessfully asked to see his lawyer inadmissible, or the rule of *Miranda* v. *Arizona,* 384 U.S. 436 (1966), that a confession given by an accused person who has not been warned of his right to see counsel is inadmissible.

Second, *Tehan* v. *United States ex rel. Shott,* 382 U.S. 406 (1966), Un. Br. 50, in which this Court declined to apply retroactively the rule announced in *Griffin* v. *California,* 380 U. S. 609 (1965), that a state prosecutor or judge violated due process if he commented on a defendant's failure to testify in his own behalf.

Third, *Linkletter* v. *Walker,* 381 U.S. 618, 629 (1965), Un. Br. 50, 51, in which this Court declined to give retroactive application to the rule announced in 1961 in *Mapp* v. *Ohio,* 367 U.S. 643, that evidence obtained by an unconstitutional search by State officers might not be admitted in a State trial.

In all of these constitutional decisions this Court, we submit, was concerned with the avoidance of disruptions in the administration of our criminal law from newly required or inhibited procedures together with full regard to the interests of persons accused or on trial. The important issue of retroactivity in this constitutional sense is a far cry from Hanover's case.

Hanover submits that United's plea of special injustice and gross unfairness has no place in Hanover's action for treble damages against a monopolist. Hanover, we repeat, has proved monopolization and the injury to its business during the period of the applicable statute of limitations.

It is entitled to recover. We note again that United has cited no precedent that would even justify consideration of such a plea in a treble damage action.

## VI.

**Answer to United Brief, Point III A, pp. 52-56, and to Point IV A, p. 61, that Hanover sustained no injury because it would not have bought the machines and because cost of capital considerations show that Hanover sustained no loss by leasing.**

United argues that the testimony of expert witnesses as to "cost of capital" was erroneously disregarded by both courts below and that if Hanover had taken "cost of capital" into account in reaching a decision to buy or lease shoe machinery "Hanover would not have bought if it could," Un. Br. 56.

There are many answers to these contentions in the findings of the District Court, accepted by the Court of Appeals and not challenged by United:

1. The finding, based in part on the testimony of United's expert:

> "Hanover had sufficient finances to purchase. It had ample working capital. During 1939 and 1940 its current and total liabilities were minimal in relation to current assets, and even to quick assets. United's expert, Dr. Corson, a management consultant on problems of economics, marketing, finance, personnel administration and organization, testified that Hanover had sufficient funds to purchase the machinery here in question without borrowing additional capital. If it had borrowed in 1939, its financial condition was such that the interest would have been at the then prime rate of 1½ percent, or at most 2 percent" (A. 79-80) 245 F. Supp. at 286.

2. The finding:

> "Hanover has proved that as a consequence of United's monopolization it was unable to purchase most of the more important machines which it would have purchased had they been available" (A. 81) 245 F. Supp. at 287.

The detailed supporting findings are at (A. 64-81) 245 F. Supp. at 279-287.

3. These findings were accepted by the Court of Appeals, which concluded:

> "The court below found that 'Hanover has proved that as a consequence of United's monopolization it was unable to purchase most of the more important machines which it would have purchased had they been available,' 245 F. Supp. at 287. This finding negatives any inference of acquiescence in the United leasing system. The finding in the Government case of the existence of the monopoly and of United's policy against sales, the participation of Mr. Sheppard, Hanover's president, in the effort of a trade association of which he was president to persuade United to offer more of its machinery for sale and Hanover's purchase of machinery from United when it first became possible to do so by virtue of the Government decree, sufficiently support the finding by the court below and forbid our declaring it to be clearly erroneous" (A. 189-90) 377 F.2d at 781.

Against the foregoing, United's claim that the courts and Hanover should have considered "cost of capital" is hollow and empty.

The District Court defined "cost of capital" as "an economic concept which has been defined as 'the rate of return expected by investors on capital funds they place at . . .

[a concern's] disposal'" (A. 87) 245 F. Supp. at 289-290, and then, after a full review of the testimony of the experts (A. 87-92) 245 F. Supp. at 290-292, concluded:

> "On the record there is no clear measurement for cost of capital. Even if measurable, it is not a proper element of the damage calculation. Cost of capital is a guide, not rigid or inflexible, which with other considerations such as opportunity, preference, necessity and the like, may dictate action and policy. Cost of capital, other than interest on borrowed funds, is not an item of cost or expense that would directly affect Hanover's profits and losses in any year. The financial statements and the testimony of Dr. Cyert and Mr. Spence, however, indicate that Hanover would have borrowed the necessary capital for the purchase. The calculations should be adjusted to reflect a 2.5 percent interest rate" (A. 91-92) 245 F. Supp. at 292.

Hanover's damage calculations were adjusted to reflect this interest rate and accordingly interest in the amount of $69,259 was subtracted from the damage award (A. 107, 166) 245 F. Supp. at 299, 302.

The Court of Appeals accepted these findings:

> "The novel concept which United sought to have approved has not yet reached the point of general acceptance even among economists. We agree with the court below that cost of capital is not sufficiently related to actual costs to be included in an antitrust damage calculation" (A. 213) 377 F.2d at 792.

Both courts were correct in rejecting United's economic theories, which disregarded Hanover's ample supply of funds and its ability to borrow (A. 89) 245 F. Supp. at 291, and which would have had no effect on Hanover's demonstrated damages.

In its brief before this Court, United argues, Un. Br. pp. 54-55, that both United and National Shoe Manufacturers Association (N.S.M.A.) of which Hanover was a member

"accepted the cost of the capital" as a necessary element in negotiations required under par. 9 of the final decree in the Government case on a plan for terminating outstanding leases and providing an option to the lessee shoe manufacturers to buy the machines. Even if this were correct, it does not follow that "cost of capital" is therefore relevant in damage calculations. It is not, however, correct. The District Court found that both United and N. S. M. A. rejected completely the concept of "cost of capital" advocated by the experts:

> "Mr. Salinger, a United witness, testified that prices were arrived at 'on a purely bargaining position' without regard to costs, values or any so-called 'equivalency formula.' To facilitate agreement, the economic experts, all of whom argued for cost of capital, were finally excluded from the negotiations. There is no evidence that Mr. Sheppard [president of Hanover], although a member of the N. S. M. A. negotiating committee ever agreed with the cost of capital concept" (A. 96-97) 245 F. Supp. at 294.

The simple fact is that the "cost of capital" for which United argues is not and would not have been a cost to Hanover which would affect the damage calculations. The District Court gave full effect to the only cost of capital Hanover would have incurred, the interest it would have had to pay on the funds it would have borrowed to buy the machines. Dr. Corson's theoretical "cost of capital" over and above such interest payments has no relevance to Hanover's damage calculations.

## VII.

**Answer to United Brief, Point III B, pp. 57-60, that a condition precedent to Hanover's recovery is prior demand to buy and Hanover failed to make such a demand of United.**

United here argues that Hanover is barred from asserting injury because it failed to demand that United sell to Hanover United's principal machines offered only on lease. United seems to be pressing this point as a point of law because no finding of fact is challenged under Rule 52(a) of the Federal Rules of Civil Procedure as "clearly erroneous." However, we deem it essential to state the findings below on this point.

The District Court found, in the course of a comprehensive review of the impact of the monopolization on Hanover (A. 64-81) 245 F. Supp. at 279-287:

> "Hanover never asked United if it could buy the lease-only machines. Neither did it protest its inability to buy. Mr. Sheppard testified that any such request would have been a 'foolish question.' This explanation does not seem unreasonable in view of the findings in the Government case and the evidence in this case" (A. 66) 245 F. Supp. at 280.

The findings in the Government case to which the District Court referred include the finding that "The more complicated machines, those producing the largest revenue, and those of more importance for the shoe manufacturer are offered only for lease" (110 F. Supp. 295, 314; also at 340). The practice of leasing shoe machinery had been "continuously used by United and most of its American competitors" (110 F. Supp. 295, 314).

Turning to the evidence in this case, the District Court found that "not only Mr. Sheppard [president of Hanover] but representatives of the whole shoe machinery industry apparently thought that they were captive customers of United" (A. 66) 245 F. Supp. at 280. This finding is not challenged nor are other findings that since the 1920's Hanover "was actively engaged in a search to buy non-United Goodyear welt shoe machinery" (A. 65) 245 F. Supp. at 280, that Hanover's President, Sheppard, took part in a trade association effort "to search for and disseminate information on modern non-United shoe machinery * * * and to persuade United to offer more of its machinery for sale" (A. 65-66) 245 F. Supp. at 280, and that Hanover bought machinery from United at the first opportunity following the availability of machinery for purchase under the terms of the final decree in the Government case (A. 68-71) 245 F. Supp. at 281-282.

The foregoing findings make it obvious that United gravely errs in saying that the District Court's conclusion "was based solely upon the self-serving testimony of a Hanover officer," Un. Br. 59.

The Court of Appeals accepted the findings of the District Court and held as a matter of law that it would be "ironic as well as idle" to require a demand in the situation shown in this record:

> "The court below found that 'Hanover has proved that as a consequence of United's monopolization it was unable to purchase most of the more important machines which it would have purchased had they been available.' 245 F. Supp. at 287. This finding negatives any inference of acquiescence in the United leasing system. The finding in the Government case of the existence of the monopoly and of United's policy against sales, the participation of Mr. Sheppard, Hanover's president, in the effort of a trade association

of which he was president, to persuade United to offer more of its machinery for sale and Hanover's purchase of machinery from United when it first became possible to do so by virtue of the Government decree, sufficiently support the finding by the court below and forbid our declaring it to be clearly erroneous.

"The question remains, however, of the necessity of a formal demand for the purchase of machines during the damage period. On this issue the court below found: 'Hanover never asked United if it could buy the lease-only machines. Neither did it protest its inability to buy. Mr. Sheppard testified that any such request would have been a "foolish question." This explanation does not seem unreasonable in view of the findings in the Government case and the evidence in this case.' 245 F. Supp. at 280.

"Hanover was, as the court below found, along with the entire shoe machinery industry, a 'captive customer' of United. What the witness characterized as foolish amounts to a futile gesture which the law does not require. Hanover had been a customer of United in the leasing of machinery for many years. It was well aware of United's power as the supplier of machinery and of its policy against sales. In such circumstances it would be ironic as well as idle to require the victim of the monopoly to make an explicit demand the denial of which was implicit in the continuance of the monopoly. See *Continental Ore Co.* v. *Union Carbide & Carbon Corp.*, 370 U.S. 690, 699 (1962)" (A. 189-190) 377 F.2d at 781.

We further submit that, despite United's effort to distinguish it in its brief, Un. Br. 60, the decision of this Court in *Continental Ore Co.* v. *Union Carbide and Carbon Corp.*, 370 U.S. 690 (1962) is controlling on this point.

In that case, Continental sued Union Carbide and others for damages resulting from the latter's illegal monopolization of the vanadium oxide market. The jury found for the defendant and the verdict was affirmed by the Court of

Appeals for the 9th Circuit, 289 F. 2d 86 (1961). The Court of Appeals reasoned that since Continental had not actually requested that defendants sell it vanadium oxide nor sought to purchase it from all other possible sources, it had not established that the illegal monopolization was the cause of its injury.

This Court reversed and remanded the case for further trial:

> "Furthermore, we do not believe that respondents' liability under the antitrust laws can be measured by any rigid or mechanical formula requiring Continental both to demand materials from respondents and to exhaust all other sources of supply. The Court of Appeals appears to have accorded no weight to Continental's evidence which was offered to show that respondents had interfered with, acquired, or destroyed the several small independent sources of vanadium oxide relied upon by Continental. Under the criteria used by the Court of Appeals, respondents could, with impunity, concertedly refuse to deal with Continental while the latter was able to obtain some oxide from independent sources, then proceed at their leisure to dry up those other sources, and finally insist that Continental make repeated demands for respondents' oxide before incurring antitrust liability. The cases relied upon by the Court of Appeals clearly do not support any such formula," 370 U. S. at 699.

A "rigid or mechanical formula" that requires an empty demand to the effect that a monopolist cease monopolizing surely has no place in Hanover's case. Hanover's president, Sheppard, testified that a request to buy would have been a "foolish question," (A. 66) 245 F. Supp. at 280. The District Court, under the circumstances here present, found this explanation not unreasonable (A. 66) 245 F. Supp. at 280. The Court of Appeals aptly characterized a demand

in the situation presented in this record as "a futile gesture which the law does not require" (A. 190) 377 F. 2d at 780-781.

In support of its claim of the need for prior demand United cites, as it did to the courts below, eight motion picture cases, Un. Br. 57.

Two of them were distinguished by this Court in the Continental Ore case.* All are distinguishable because in all the defendants are charged with a conspiracy to deprive the plaintiffs of films. In such cases, a plaintiff must show that he wants the films. If he did not, he remains a stranger and is not in a position to complain. If he did, he becomes one who seeks to do business and he may go forward with proof of conspiracy, etc. The requirement of a demand is an obvious essential in this type of case.

In the present case, however, Hanover was for many years a customer of United and used United's machines in the only way it could get them. The complaint is that it was deprived by a monopolist's lease-only policy of the opportunity to buy machines. Hanover was well aware of that policy. So was United — it had established it.

It is naïve to suppose, as United argues, that, absent a demand, Hanover could not have been injured or damaged. Both injury and damage were present, demand or no demand, as both courts below found.

While United rejects the holding of the Court of Appeals that the *Alcoa* and *American Tobacco* cases effected a change in the law, Un. Br. 46-48, it argues that, if those cases apprised United of such a change, a demand by Hanover after them "cannot be presumed futile," Un. Br. 59.

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* See fn. 8, 370 U. S. at 699 in which *Royster Drive-In Theatres* v. *American Broadcasting-Paramount Theatres, Inc.*, 268 F. 2d 246, 251, *cert. denied*, 361 U. S. 885 and *Milwaukee Towne Corp.* v. *Loew's, Inc.*, 190 F. 2d 561, 568, *cert. denied*, 342 U. S. 909 are cited as not supporting any formula that demands must be made.

The short answer is that *Alcoa* and *American Tobacco* did no more than apply rules established both by the Sherman Act and by this Court long before they were decided, as is pointed out in Hanover's brief in No. 355, pp. 27-31. In short, there was no change in the law. Nor was there any change in United's monopoly. It was the same in 1939 as in 1945 and 1946 and in 1953 and until 1955 when, pursuant to this Court's affirmance of the decree in the Government case, its adverse effects on United's customers were finally ended.

## VIII.

**Answer to United Brief, Point IV B, pp. 61-66, that Hanover sustained no damage because "any excess cost of leasing over cost of ownership was not absorbed by Hanover but passed on to others."**

Here United raises once more the defense that Hanover suffered no damage to its business or property under the Clayton Act because it operated at a profit and thus recouped, in the sale price of the shoes it sold, the entire cost of the shoe machinery that it leased from United during the damage period. This "passing-on" defense was separately tried under Rule 42(b) of the Federal Rules of Civil Procedure as an issue that might be dispositive of the case. Hanover prevailed before the District Court, *Hanover Shoe, Inc.* v. *United Shoe Machinery Corp.*, 185 F. Supp. 826 (M.D. Pa.), the Court of Appeals affirmed *per curiam*, 281 F. 2d 481 (3d Cir.) and this Court denied certiorari, 364 U.S. 901 (1960).

This issue is now before this Court in the grant of United's cross-petition.

The late Circuit Judge Goodrich sat in the District Court on the separate trial. This separate trial proceeded on two stipulated assumptions: (1) that United had violated the antitrust laws and (2) that the excessive cost of shoe machinery existed, as Hanover alleged, 185 F. Supp. at 828. Based upon these assumptions, Judge Goodrich held, as a matter of law, that "the causal relation between defendant's wrong and plaintiff's harm is obvious," *id.* at 829.

The point is self-evident.

Plaintiff was a customer of defendant. It was a lessee of defendant's shoe machinery. It was the ultimate consumer of defendant's products — the use of shoe machinery. Actually, defendant owned all the leased machinery. Plaintiff was a lessee.

Judge Goodrich next dealt with United's legal argument that it was relieved of liability "because the plaintiff passed on its loss to its customers" and held that:

> "The plaintiff's injury occurred when it was charged too much for the machinery. If it had not thus been illegally charged for machinery it would have had more money to pay out in dividends, or to engage in a further development campaign to sell its shoes, or to raise the wages of its employees, or to enlarge its bank account as protection against a rainy day, or for all of these things. The plaintiff against whom a tort is committed has his cause of action at the moment that the tort occurs." 185 F. Supp. at 829.

Judge Goodrich referred to the decision in *Southern Pacific Co.* v. *Darnell-Taenzer Lumber Co.*, 245 U.S. 531 (1918) where Mr. Justice Holmes said:

> "The only question before us is that at which we have hinted: whether the fact that the plaintiffs were able to pass on the damage that they sustained in the first instance by paying the unreasonable charge, and to collect that amount from the purchasers, prevents

> their recovering the overpayment from the carriers. The answer is not difficult. The general tendency of the law, in regard to damages at least, is not to go beyond the first step. As it does not attribute remote consequences to a defendant so it holds him liable if proximately the plaintiff has suffered a loss. The plaintiffs suffered losses to the amount of the verdict when they paid. Their claim accrued at once in the theory of the law and it does not inquire into later events. * * * The carrier ought not to be allowed to retain his illegal profit, and the only one who can take it from him is the one that alone was in relation with him, and from whom the carrier took the sum. * * * Behind the technical mode of statement is the consideration well emphasized by the Interstate Commerce Commission, of the endlessness and futility of the effort to follow every transaction to its ultimate result. * * * Probably in the end the public pays the damages in most cases of compensated torts." 245 U.S. at 533-534.

The Court of Appeals affirmed per curiam on the opinion of Judge Goodrich and referred to it as "thoroughly convincing", 281 F. 2d 481.

The plain and simple fact is that the direct result of United's monopolization of the shoe machinery trade and its exclusionary lease-only policy was to deprive Hanover of the opportunity to enjoy the savings of being able to buy machinery in a free and open competitive market. The fact that, in spite of being deprived of these savings for its shoe machinery, Hanover was still able to make a profit in the retail sale of shoes may be evidence of the competence of its management but is irrelevant to the claim now made. The direct and proximate result of United's monopolization was to require Hanover to pay cash out of pocket that it should not have been required to pay to secure shoe machinery. That is what Hanover seeks to recover. There is

no reason in this case to go beyond this direct and immediate effect of United's monopolization.

To go beyond "the first step" and bar recovery in this case is to reward the wrongdoer at the expense of the victim and to nullify the remedy provided by Congress.

Decisions of this Court and of lower federal courts support the rule stated above.

In *Chattanooga Foundry and Pipe Works* v. *City of Atlanta,* 203 U.S. 390 (1906), this Court approved a verdict for "the difference between the price paid and the market or fair price that the city would have had to pay under natural conditions had the combination been out of the way," at 396. The City of Atlanta was buying pipe for its city water works. No inquiry was made as to whether the city might have or had in fact recovered the amount of the excess cost of the pipe through increased charges for water or increased taxes. The point was irrelevant to the application of the correct rule of damage law.

In *Thomsen* v. *Cayser,* 243 U.S. 66 (1917), plaintiffs as merchants and shippers recovered as damages the difference between reasonable shipping charges and excess shipping charges resulting from a combination in restraint of foreign trade, at 88. Injury was shown in the amount of the overcharge without any inquiry as to whether plaintiffs might have secured reimbursement by adding that amount to the price of the goods to their customers.

See also *Story Parchment Co.* v. *Paterson Parchment Co.,* 282 U.S. 555, 561-562 (1931).

A large number of lower court cases have applied the principles stated in these decisions:

*Straus* v. *Victor Talking Machine Co.,* 297 Fed. 791, 799, 802-803 (2d Cir. 1924);

*Pfotzer* v. *Aqua Systems,* 162 F. 2d 779 (2d Cir. 1947);

*Peto* v. *Howell,* 101 F. 2d 353 at 361 (7th Cir. 1939);

*Alden-Rochelle, Inc.* v. *American Society of Composers, Authors and Publishers* (ASCAP), 80 F. Supp. 888 at 898 (S.D.N.Y. 1948);

*American Crystal Sugar Co.* v. *Mandeville Island Farms*, 195 F. 2d 622 at 625 (9th Cir. 1952), *cert. denied* 343 U.S. 957.

United urges, Un. Br. 63, that the decisions below on passing-on are contrary to the rule of three oil jobber cases.* To state these cases is to distinguish them. In all it is recognized that an oil jobber — a middleman — who buys and sells at a guaranteed margin between purchase price and selling price has suffered no damage under the antitrust laws from an alleged conspiracy to fix his buying price.

United further argues, relying on four decisions growing out of the treble damage actions against electrical equipment manufacturers,** that, while they rejected the passing-on defense, such rejection was based on the lack of standing of the customers of the utilities to sue the equipment manufacturers and on the ground that any recoveries would benefit the customers of the utilities through lower rates, Un. Br. 64-65. United has failed to read these cases accurately. All of them are in accord with the prior decision on the separate trial of the passing-on issue in this case and all but *Ohio Valley* cite that

* United cites *Clark Oil Co.* v. *Phillips Petroleum Co.*, 148 F.2d 580 (8th Cir. 1945), cert. denied 326 U.S. 734; *Northwestern Oil Co.* v. *Socony Vacuum Oil Co.*, 138 F.2d 967 (7th Cir. 1943), cert. denied 321 U.S. 792; and *Twin Ports Oil Co.* v. *Pure Oil Co.*, 119 F.2d 747 (8th Cir. 1941), cert. denied 314 U.S. 644.

** *Commonwealth Edison Co.* v. *Allis-Chalmers Mfg. Co.*, 335 F. 2d 203 (7th Cir. 1964); *Ohio Valley Elec. Corp.* v. *General Elec. Co.*, 244 F. Supp. 914 (S.D.N.Y. 1965); *Public Util. Dist. No. 1* v. *General Elec. Co.*, 230 F. Supp. 744 (W.D. Wash. 1964); *Atlantic City Elec. Co.* v. *General Elec. Co.*, 226 F. Supp. 59 (S.D.N.Y.), appeal denied 337 F. 2d 844 (2d Cir. 1964). United also seeks comfort in a fifth decision, *Commonwealth Edison Co.* v. *Allis-Chalmers Mfg. Co.*, 315 F. 2d 564 (7th Cir. 1963) cert. denied 375 U.S. 834, which affirmed denial of an application by the state of Illinois to sue as parens patriae of Illinois electricity consumers.

decision. All of them rely on *Chattanooga Foundry and Pipe Works* v. *City of Atlanta*, 203 U.S. 390 (1906) and all save *Public District No. 1* rely on *Southern Pacific Co.* v. *Darnell-Taenzer Lumber Co.*, 245 U.S. 531 (1918). In *Commonwealth Edison*, 335 F. 2d at 208, and *Atlantic City*, 226 F. Supp. at 69, mention is made of the fact that the middleman test is not the only factor to be considered in distinguishing the oil jobber cases and of the further fact that utilities may pass on to their customers both excessive costs and any recoveries received. All the cases, most importantly, are in accord with the principle of *Commonwealth Edison Co.* v. *Allis-Chalmers Mfg. Co.*, 315 F. 2d 564 (7th Cir. 1963), *cert. den.* 375 U.S. 834 (1963), that the violations by the defendant electrical equipment manufacturers "spent themselves on these purchasers", to wit, the utility plaintiffs, and that "the aftereffects of the hurt on consumers are consequential and too remote" to give the consumers any standing to sue, *id.* at 567. The same, of course, can be said of the millions of persons who over the years have bought pairs of shoes in Hanover stores.

United misleads this Court in shocking fashion when it states, Un. Br. 65, that since Hanover sold only to four customers it would be simple for them to sue United for damages. One of the four customers is said to be the United States Government but the very finding of the District Court cited by United is that these sales were " . . . large quantities of military shoes manufactured during World War II" (A. 30) 245 F. Supp. at 264. The most shocking reference is to Sheppard & Myers, Inc. as though it was in the same category as the others. On the contrary, the cited finding of the District Court is that, except for the World War II military sales and sales to Montgomery Ward and J. C. Penney since World War II,

"Hanover has sold the shoes it manufactured directly through retail men's shoe stores operated by its wholly owned subsidiary, Sheppard & Myers, Inc." with "currently about 110 retail stores" (A. 30-31) 245 F. Supp. at 264.

It is absurd, we submit, to attempt to defeat Hanover's claim by urging, as United does on p. 65 of its brief, that the millions of ultimate consumers of Hanover shoes might bring a class action under Rule 23 of the Federal Rules of Civil Procedure.

United claims, Un. Br. 65, that if Hanover recovers treble damages for overcharges which are passed on to its customers it will not be compelled to allow the customers any of the benefits of the recovery and will thus receive a windfall. Obviously, United wants the "windfall" for itself. If United had read more carefully the electrical cases it cites it might have refrained from urging its "windfall" contention, a contention already rejected by the Court of Appeals in the Hanover passing-on case, 281 F. 2d at 481. This identical argument was made in two of the electrical cases. In *Commonwealth Edison Co.* v. *Allis-Chalmers Mfg. Co.*, 335 F. 2d 203 (7th Cir. 1964) the court held that any windfall should not go to the antitrust violator, *id.* at 209. Even more explicit was the language of the District Court for the Southern District of New York in *Atlantic City Elec. Co.* v. *General Elec. Co.*, 226 F. Supp. 59 (1964):

> "Defendants maintain that if plaintiffs are permitted to recover treble damages notwithstanding the passing on of the overcharges, they will receive a 'windfall.' Defendants are hardly in a position to urge this objection since recognition of the passing-on defense will result in a windfall to them, and if there is to be a windfall in any case, it is plaintiffs, and not defendants, who should receive it," *id.* at 70.

## IX.

**Answer of United Brief, Point V, pp. 66-71, that Hanover's recovery "is barred by the Pennsylvania six year statute of limitations."**

United here urges that the wrong of which Hanover complains is directed against United's lease-only system and the refusal to sell that was an essential part of it, which had its inception "in or about the year 1912," Un. Br. 67, and that this marks the accrual of Hanover's cause of action. It follows, United argues, that Hanover's claim has long been barred.

Hanover's position is that the wrong of which Hanover complains is the continuing monopolization of the shoe machinery trade by United throughout the period of limitations and it seeks recovery for the injury to it during that period.

The District Court below rejected United's contentions.*

The Court of Appeals did not discuss this point in view of its holding that the period of injury did not com-

* The District Court held that:

"The injury and claimed damage flows from a continuing violation of Hanover's right to deal in a free market" (A. 100) 245 F. Supp. at 296.

* * *

"Hanover had a continuing right not to be injured in its business or property in the manner asserted under the facts of this case" (A. 103) 245 F. Supp. at 297.

* * *

". . . as long as United continued to monopolize the shoe machinery market Hanover could bring an action for the continued monopolization within the six year period . . ." (A. 104) 245 F. Supp. at 297.

mence until 1946.* However, in its supplemental opinion on United's petition for rehearing the Court of Appeals again reviewed United's contentions, correctly stated Hanover's claim to be for damages inflicted after 1939 (A. 221) 377 F. 2d at 794, and concluded:

> "The rule applicable to the facts in this case is that where the repeated and measurable invasion of a plaintiff's rights occurs both outside the statutory period and also within it, the fact that some of the injury and damage occurred outside the statutory period does not affect the plaintiff's right to recover for the separate invasion of its rights which occurred within the period. Indeed, any other rule would be an affront to reason, . . ." (A. 221-222) 377 F. 2d at 795.

This, we submit, is a correct statement of applicable law.

## CONCLUSION

United's constant refrain throughout its brief is about "equities" that it claims require dismissal of this action, which "lacking justification from the outset, has now burdened the Third Circuit for twelve years," Un. Br. 71-72. The real burden has been on Hanover, which has been trying for twelve years to recover for injury to its business under the statute that gives it a cause of action.

No court below has found any lack of justification for Hanover's action. Hanover has prevailed on the merits in all courts below including the separate trial on the passing-

* The Court of Appeals held:

"The contention now made, however, is that if there was a refusal by United to sell shoe machinery to Hanover, the injury occurred many years prior to 1939, in fact perhaps even before the present century, and hence all recovery is barred by the statute of limitations. This contention falls in view of our holding that the duty to sell established by the Government decree did not come into existence until 1946. Since the injury could not have occurred prior to 1946, Hanover's claim is well within the period of the statute of limitations" (A. 211) 377 F. 2d at 791.

on issue and in No. 335 in this Court it seeks review of the two issues affecting damages that were decided against it in the Court of Appeals.

Unlike United, Hanover asks for no special "equities." It asks that its cause of action to recover damages for violation of the Sherman Act be given effect where, as here, Hanover has proved a violation of Section 2 of the Sherman Act and that the injury to its business from the violation accrued during the period of the applicable statute of limitations.

The "equities" proffered by United are ingenious attempts to escape its liability to Hanover under the statute. They have no place to bar Hanover's cause of action. This Court has often stated the important part that the private action plays in the enforcement of the antitrust laws. It should not now be impaired by acceptance of United's proffered "equities."

In effect what United claims is a prescriptive right to violate the antitrust laws. The District Court in the Government case correctly rejected United's reliance upon judgments of this Court in earlier cases in which it was a party defendant. If United's claim of bar by the earlier decisions* was not recognized in the Government case, it is hard to understand why it has any greater claim to acceptance against a private litigant.

For all of the reasons stated above, Hanover asks, as it does in No. 335, that:

1. the amended judgment of the Court of Appeals dated June 7, 1967 be reversed in so far as it

(a) orders and adjudges that the judgment of the District Court dated August 13, 1965 be vacated as to

* In its answer in the Government case, *United States* v. *United Shoe Machinery Corporation*, 110 F. Supp. 295, 298 (D. Mass. 1953), United pleaded the second decision as "a complete defense in bar" to the Government action and the third decision as a partial bar. See Answer of United in Government case, Third Defense, pp. 64-69 and Fourth Defense, *id.* pp. 69-74.

damages and a new trial awarded limited to damages, and

(b) orders that the award of counsel fees by the District Court be vacated and that said award be recomputed,*

2. the Court of Appeals be directed to affirm the judgment of the District Court dated August 13, 1965; and

3. said amended judgment of the Court of Appeals be affirmed in so far as it provides for a reconsideration by the District Court of the issues raised before the Court of Appeals, not decided by the Court of Appeals, and not in issue before this Court, with respect to Hanover's cross-appeal from the judgment of the District Court in so far as said judgment excludes from the damage calculation damages with respect to one machine, United's Goodyear Outsole Rapid Lockstitch Machine.

Respectfully submitted,

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*Of Counsel*

Dated: December 22, 1967

* The award of counsel fees by the District Court was vacated by the Court of Appeals only because it had reduced the period for which damages were to be awarded and had ordered a retrial as to damages to take account of the claimed tax benefits to Hanover on account of leasing. The Court of Appeals directed that counsel fees be redetermined in the light of whatever damages the District Court might find on rehearing (A. 217) 377 F. 2d 793. There will be no need to recompute damages if this Court sustains Hanover's contentions on these points in No. 335. It follows that there will also be no need to recompute counsel fees. Hanover, therefore, asks that the amended judgment of the Court of Appeals be reversed in so far as it orders that the awards of counsel fees by the District Court be vacated.

## APPENDIX A

**Excerpts from transcript of oral argument in the Supreme Court of the United States in *United Shoe Machinery Corporation* v. *United States*, October Term, 1953, No. 394**

**Argument of Mr. Branch, counsel for United:**

The only one of United's three principal sources of power which the court found was not plainly beyond reproach consisted of those practices which the court lumped in the phrase "the leasing system."

As Mr. Proctor pointed out, the leasing system was used by United always, it had been used by the constituent companies of which United was formed, it is used by United's competitors, and the important features of that are that, as to the more important complicated machines, United does not offer them for sale.

It offers them only for lease, and furnishes service, not only repair service, but other types of service, without additional segregated charges. (p. 31)

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The Chief Justice: Have these competing companies been using practically the same leasing system that you have through the years?

Mr. Branch: Yes.

The Chief Justice: Or is that a recent performance?

Mr. Branch: Oh, no, they have always done it, and they have always offered their more important machines for lease only and have furnished service without segregating charge, and they are going to be allowed to continue to do

it, although we are going to be prevented from doing it. (p. 46)

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But we say — and I realize how diffident one should be in saying this — that certain finding of fact by the court below, much as we respect Judge Wyzanski, were clearly erroneous, and the ones I want to refer to particularly are those which I will read, which he expressed this way:

> "The complex of obligations and right accruing under United's leasing system in operation deter a shoe manufacturer from disposing of a United machine and acquiring a competitor's machine, and he is," I quote again, "deterred more than if he owned that same machine."

That was a basic finding on which the decision rests. It rests on the leasing practice and the objection to the leasing practice really comes down to that. (p. 52)

**Argument of Mr. Spritzer, counsel for the Government:**

Now, getting to the leasing system, and we use the words "leasing system" very broadly to include the unwritten practices as well as the written provisions of leases, and also to include the servicing and pricing of leased machinery — getting to the leasing system, the first point to be noticed is that while United offers some machines on an outright sale or on an optional, that is leased or sale, basis, its important machines, almost without exception are available on lease only, and I might state before I go any further, that I am going to be discussing many different features of the leasing system, and I think it is, as the Court said, the cumulative effect of this or of these which one has to consider.

Justice Reed: What is the Government's objection to the leasing system?

Mr. Spritzer: That it is exclusionary, discriminatory, anti-competitive and unfair. I think I can only develop that in terms of the facts. (pp. 84-85)

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Mr. Spritzer: Under the decree, the lessee will be able to terminate after one year. The leases will be for a five-year period, but there will be a power of termination earlier. Of course, there will be an option that the lessee will have to buy rather than to lease, and many of the more objectionable and restrictive features and discriminatory features will be eliminated, so we think the decree does hold some promise, modest though it is. (pp. 85-86)

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Justice Frankfurter: The decree now gives a choice initially, but from the period, tenure of the lease, the term of the lease, the initiative is there to buy rather than to let?

Mr. Spritzer: Yes. United is required to offer an option to purchase any machine which it elects to offer on lease.

Justice Frankfurter: Did the Government take the position that wholly apart from the terms of the leasing system, leasing as such is one of the something or other unusual, unnatural barriers?

Mr. Spritzer: No, indeed. We did not ask that leasing be prohibited.

Justice Frankfurter: You did not?

Mr. Spritzer: No.

Justice Frankfurter: So that leasing itself cannot be one of the monopoly-aiding instrumentalities?

Mr. Spritzer: It is this leasing system as practiced.

Justice Frankfurter: Under the terms, aside from that, leasing as such, you did not ask to be outlawed?

Mr. Spritzer: No, we asked for the option, which the Court ordered. (pp. 87-88)

## APPENDIX B

**Excerpts from Findings of Fact, Conclusions of Law and Opinion of Judge Sheridan dated April 28, 1965 in the United States District Court for the Middle District of Pennsylvania (A 81-96) 245 F. Supp. 287-294**

**E. Damages.**

1. The Leidesdorf Calculations.

The primary damage claimed by Hanover is the excess of leasing cost over what it would have cost to own the same machines had they been available for purchase during the period from July 1, 1939, to September 21, 1955. This required, among other things, a determination of what the purchase prices would have been. The first time the lease-only machines were offered for sale was in 1955 when United established prices for the sale of its machines new (1955 prices). Hanover's proof consisted of the following steps.

a. The cost to Hanover of the machines presumably purchased by it in 1939, or in any subsequent year when additional machines or replacement machines were presumably acquired by it, was determined by applying the Bureau of Labor Statistics Consumer Price Index, All Items, for the years of acquisition, to the 1955 prices.

b. The cost so determined was reduced by the residual value of (1) machines deemed to have been disposed of at the end of an assumed life expectancy and (2) machines on hand on September 21, 1955, the date of the commencement of this action. The reduction was determined by first applying to the 1955 prices the discount table that had been negotiated between United and N. S. M. A. pursuant

to the order of the district court (the discount table). Then the Bureau of Labor Statistics Consumer Price Index, All Items, for the years of disposition prior to 1955 was applied to the discounted prices.

c. The difference between a. and b. was subtracted from the total rents and royalties paid by Hanover during the complaint period.

d. The estimated cost to Hanover of servicing the machines it presumably purchased was deducted from the remainder. For the 20 major machine types this service cost was based upon the actual service costs Hanover incurred when servicing the 20 major machine types during the year September 1, 1961, to August 31, 1962. No allowance was made for the lower costs that would have been incurred during the complaint period. For the remaining 37 machine types, the service cost was determined by taking that proportion of the service costs for the 20 major machine types for the year ending August 31, 1962, which rents and royalties paid on such 37 machine types bore to the rents and royalties paid on the 20 major machine types.

Three separate calculations were prepared by S. D. Leidesdorf & Co. (Leidesdorf), Certified Public Accountants, all of which are based substantially on this method, differing mainly in the life expectancy assumed for the various machine types. One was based on a study of the life expectancies made by Professor Joel Dean, an expert employed by United, and used by it in the course of the negotiations with the N. S. M. A. A second was based on a fifteen year life expectancy, accepted by the Internal Revenue Service for shoe machinery, for all machine types. The third was based on a life expectancy determined from the actual shipments of machines by United to Hanover, and the actual returns of machines by Hanover to United.

The damages shown by the three calculations vary between $1,821,431.77 and $1,836,060.90.

United raises several objections to this proof, which it contends renders it "speculation or guesswork" and not within the guidelines established in Keogh v. Chicago & Northwestern Ry. Co., 260 U. S. 156, 43 S. Ct. 47 supra, and Bigelow v. RKO Radio Pictures, Inc., 1946, 327 U. S. 251, 66 S. Ct. 574, 90 L. Ed. 652.

The first objection is that the Leidesdorf calculations are merely mathematical calculations based on assumptions which have not been proven.

The Discount Table. United says it accepted the discount table under the pressure of the decree and the supplemental opinion of March 8, 1955, in the Government case, and after strenuous bargaining with N. S. M. A., and that Hanover used it, without further proof, in fixing the salvage value at given dates of the machines assumed to have been purchased at prior dates.

Hanover was faced with the necessity of establishing a value for machines on hand at the date of commencement of the action, or which had been disposed of previously, to be deducted from the computed costs of machines assumed to have been purchased to arrive at a computed net cost of ownership. Since there was no market price for secondhand machinery, Hanover used the discount table which reflected age and other conditions. It had no alternative.

United offered testimony that the prices established by application of the discount table did not take into account actual value. This cannot be accepted. Value has different meanings to different persons. The discount table was negotiated. Negotiation is a process of submission and consideration of offers until an acceptable offer is made and accepted. United States v. John McShain, Inc., 1958, 103

U. S. App. D. C. 328, 258 F. 2nd 422, 424, cert. denied 1958, 358 U. S. 832, 79 S. Ct. 52, 3 L. Ed. 2d 70, United's contention, in effect, that it was forced to agree to such prices, is without merit. The decree required United, within certain time limits, only to present a plan for the termination of outstanding leases and for the sale of the lease-only machines. There was no attempt to dictate prices, or to force United to accept unreasonable lease and sale terms. Judge Wyzanski's supplemental opinion merely required United to disclose the data on which Joel Dean's calculations were based. Its purpose was to remove unnecessary roadblocks in the negotiations. It did not force terms on United or require it to accept the terms of N. S. M. A. United offered no evidence that the sales prices were in fact unreasonably low. The use of the discount table was proper.

Date of Commencement of Action. The salvage value of machines assumed to have been purchased is supposedly increased because the discount table assumes September 21, 1955, as the correct date for cutting off the estimated life of the machines, thereby diminishing the net cost of ownership. United has not suggested any other date.

The applicable statute of limitations is measured from the date the action was begun, September 21, 1955. Since this is the end of the damage period, the comparison of rental costs to cost of ownership would have to include machinery values established no later than September, 1955, for those machines assumed to be on hand at that date.

The 1955 Prices. United next argues that the sales prices constructed by Hanover assume, without any proof, that if prices were established by United for machines in 1939 and subsequent years, it would have established the prices so constructed, even though the 1955 prices were fixed under 1955 economic conditions, and under the man-

date of the decree providing that sales prices could not be fixed so as to make it substantially more advantageous to lease, and that this is sheer speculation because those economic and legal conditions did not exist in 1939 and later years.

The issue is whether the prices computed by Hanover are reasonable. Dr. Corson testified that the 1955 prices, with the application of a proper index, were essential to the calculations. The 1955 prices have been adjusted to reflect economic conditions existing at the time the assumed purchases were made. The limitation that it could not be more advantageous to lease did not depress prices, because rents and royalties were not fixed or regulated. United had complete freedom to fix its lease terms and sales prices at any level. The limitation is not material to the reconstructed prices. The 1955 prices were not an assumption but a fact. The consumer price index used was also a fact.

Machine Shipments and Returns. United next argues that the Leidesdorf calculations include a practical suppression of machine returns, which occurred often, in that returns "... are treated most artificially through a series of accumulations until the totals accumulated reach the totals previously leased, when the deductions are made to show a putative transaction of indefinite character looking like a re-sale ...," and whether or not this treatment favors United, the result is "... unjustifiable as a matter of principle in falsifying the facts concerning machinery returns by which the court and the parties are bound in the ascertainment of 'damages' "; that "... ignoring returns under Form A leases until cumulative returns had exceeded cumulative shipments, is only another indication that the Leidesdorf procedures rest on the speculation that every machine in fact returned could and would have been promptly sold upon a different market at an established price. ..."

The argument is not clear and appears to misconstrue the manner in which machine returns were considered in the calculations. As a part of its approach, Hanover had to determine how many machines, if purchased, would have been required to maintain its production. Between 1939 and 1955 machines were received from United and returned to United. Hanover did not credit itself with the return of a machine because the shipment and return data showed the return in a particular year. This was in order not to take advantage of returns a lessee, and not an owner, might make because of cyclical fluctuations in production. Hanover credited itself with returns only to cumulatively offset shipments at a given time, and shipments were considered purchases only when shipments exceeded returns at a given time. This is reasonable and does not render the calculations speculative or conjectural. If Hanover had used individual returns, it would have increased the damages. United has not proved that a consideration of individual shipments and returns would decrease the amount of damages.

2. Elements Not Included in the Leidesdorf Calculations.

United attacks the Leidesdorf calculations because cost of capital, future worth and taxes are not included, and a proper index was not used.

Cost of Capital. The Leidesdorf calculations do not include cost of capital. Cost of capital is an economic concept which has been defined as "the rate of return expected by investors on capital funds they place at . . . [a concern's] disposal." Dr. Corson testified that a company usually gets its capital in four ways: debt, preferred stock, common stock and retained earnings, and that during the damage period Hanover derived its capital from the sales of common stock and retained earnings. He computed Hanover's

cost of capital in two ways. First, he took the percentage of earnings per share to the price per share of common stock for the seven years (1940, 1941, 1942, 1948, 1949, 1950, 1951) in which common stock was sold. The weighted average was 22.14 percent. He also took the percentage of net profit after taxes to stockholders' equity for the years 1939 to 1955. This average was 14.1 percent. Using the 14.1 percent, Dr. Corson made certain adjustments to the calculations. He concluded that purchases would not result in an investment return greater than the cost of the capital invested, and that the purchases were economically unsound.

If cost of capital is a necessary element of the damage calculation, the rate used by Dr. Corson does not reflect the true cost that Hanover would have had to pay or offer to attract capital. The measurement of cost of capital is vague. "Quite apart from the practical difficulties of measuring capital cost for a specific company, there is today no explicit and generally acceptable account of what is the correct concept, actual approach to its measurement. . . . The best known exception is the work of Professor Joel Dean but even his most comprehensive statement regarding the cost of capital is neither explicit nor complete." Solomon, The Management of Corporate Capital. Dr. Corson cited this work and that of Joel Dean in support of his testimony. "A person who desires neat solutions with one correct answer should avoid the computation of a corporation's cost of capital. Usually such an answer is impossible. If ten 'experts' independently computed the cost of capital of the IBM Corporation, there would be ten answers." Bierman & Smidt, The Capital Budgeting Decision. While Dr. Corson also cited this work, he disagreed with this particular view. Dr. Cyert, Hanover's expert, agreed with these authors, and listed other authorities who emphasize the difficulties in the measurement of the cost of capital.

The inexactness in its measurement is demonstrated by Dr. Corson's averages of 14.1 and 22.14 percent. The percentage of earnings per common share to price per common share ranged from 7.8 percent in 1940 to 54.5 percent in 1948. The percentage of net profit after taxes to stockholders' equity, while not fluctuating as sharply, ranged from a low of 6.72 percent in 1945 to a high of 32.59 percent in 1947. To demonstrate the inexactness also, Hanover suggests that the percentage of earnings per share to the sales price per share on a secondary issue of Hanover stock in 1956 was 8 percent. This was the first public sale of Hanover stock. Prior to that time, stock acquisition rights were limited to descendants of the original founders of the company, and certain key employees, and sales were at a discounted price reflecting book value after certain downward adjustments of capital and surplus in accordance with a predetermined formula. Both experts agreed that in measuring cost of capital in this way market value is used, and if there is no market value, then the market value of stock of similar companies. Yet, Dr. Corson was satisfied with discounted sales to family and key employees. Mr. Spence, who for many years dealt in corporate stock and securities matters, testified that during the damage period Hanover's stock, if publicly sold, would have had a market value of a minimum of ten times earnings, and probably as high as 13 times. This would indicate a cost of capital of 8 or 10 percent. Mr. Spence's opinion was based in part on the market value of stocks of other shoe manufacturers. Dr. Corson thought that the 1956 public issue was not relevant to the damage period, and that the market price of stocks of similar companies were not material because his figures were the actual cost of capital experienced by Hanover. This ignores the fact that the bulk of the assumed purchases would have been in 1939.

The evidence shows that these purchases would have resulted in a cost of capital different than that actually experienced during the damage period.

Hanover had other sources of capital. It made substantial loans in 1942 and in 1951 at interest rates of 2 to 2.5 percent. In 1942 it borrowed $300,000 without interest from two of its "family" stockholders. The borrowings were infrequent and for the most part relatively small—5.8 million during the same period, with 2.1 million the largest amount outstanding at any one time. ($535,000 is the approximate cost of the machines to Hanover in 1939.) Dr. Corson did not consider debt because he concluded it was not a principal source of capital.

Dr. Corson did not consider preferred stock as a source of capital. In 1946, Hanover issued 2.5 million of preferred stock with a 5 percent dividend. Dr. Corson said capital "was not derived in any significant part from preferred stock. . . ." It has enough significance so that it should not have been ignored as an independent source. Moreover, in arriving at the 14.1 percentage, stockholders' equity, to which profit after taxes was compared, included preferred stock. Dr. Corson said this rate was "what the stockholders essentially earned on the money they had supplied and supplied either by the purchase of stock or by the retention of earnings. . . ." The preferred stock was non-participating, and, thus, to the extent that such profit exceeded the preferred dividend rate, it does not represent what preferred stockholders earned on their capital.

Dr. Corson admitted that his figures do not represent a cost in an accounting sense. He testified that a concern which has a cost of idle capital of 14 percent and which borrows additional capital at 2 percent, and invests it at a 10 percent return, makes a profit for income tax purposes, but suffers an economic loss. He testified that an economic

loss and actual profit and loss are not the same, and that such an economic loss, while difficult to identify in the profit and loss statement in any year, in the long run will be reflected in the profit and loss statement. To include the cost of capital in Hanover's damage calculation would require an examination of the wisdom of every corporate investment. While Dr. Corson admitted that Hanover at all times had sufficient capital to purchase the machines, there is no evidence why Hanover borrowed from time to time. In many instances the loans were less than the amounts of the assumed capital purchases. Such a corporate decision to borrow funds, under Dr. Corson's testimony, would be unwise. It illustrates that a company may choose to act notwithstanding the cost of capital indicated that it should not.

Dr. Cyert, on the other hand, emphasized that the cost of capital is only a decisional guide which should form no part of a damage calculation.

In the Borden Co., 1962, 3 CCH Trade Reg. Rep. para. 16,191, a Federal Trade Commission case, Borden attempted to defend a charge of illegal price discrimination under the Robinson-Patman Act on the ground that differences in prices resulted from differences in costs. One element of cost was "Investment Cost" which appears to be of the same nature as the cost of capital. The Commission rejected it as a proper cost item:

> "Respondent's cost study fails for other reasons. For instance, it claims an 'Investment Cost' difference of $.0404 per case. Respondent apparently kept larger inventories of Borden brand evaporated milk than of the private label. In its analysis, it concludes that the money invested at 8% resulted in an inventory cost of $.0835 per case for Borden brand and an inventory cost of $.0257 per case for private label. The fallacy in this position is that the so called 'Investment Cost' is not an actual, incurred cost at all; it amounts to a return on

capital investment. Accordingly, this item is rejected for cost jutification. Cf. Thompson Products, Inc., 55 F. T. C. 1252, 1265-1266 (1959)."

On the record there is no clear measurement for cost of capital. Even if measurable, it is not a proper element of the damage calculation. Cost of capital is a guide, not rigid or inflexible, which with other considerations such as opportunity, preference, necessity and the like, may dictate action and policy. Cost of capital, other than interest on borrowed funds, is not an item of cost or expense that would directly affect Hanover's profits and losses in any year. The financial statements and the testimony of Dr. Cyert and Mr. Spence, however, indicate that Hanover would have borrowed the necessary capital for the purchase. The calculations should be adjusted to reflect a 2.5 percent interest rate.

Future Worth. United argues that future worth is a mere matter of compounding the actual machinery investment at the appropriate cost of capital; that its application to the calculations is proper because "Anyone can see that, if Hanover could have put the purchase price of machinery in a savings account and obtained over 16 years a compounded return on its money at the rate of 14%, it would be folly to make the same investment in a purchase that would not earn at least that rate of return."

Future worth does not represent a cost to Hanover. The compounding of alternative investments at the given rate over a given period indicates which investment provides the greatest return. But again it is only a guide. It does not reflect other considerations such as opportunity, preference and necessity. It does not directly affect the profit and loss statements, and would not directly enter into the determination of profit and loss in any year. The damages will include interest on the borrowed funds. Future worth is not a proper element of the damage calculations.

Taxes. Any recovery by Hanover will be subject to taxation in its entirety. Commissioner of Internal Revenue v. Glenshaw Glass Co., 1955, 348 U.S. 426, 75 S. Ct. 473, 99 L. Ed. 483. The Leidesdorf calculations do not take into account tax consequences, such as deductions for rents and royalties, and capital gain treatment for machines disposed of at greater than depreciated book value. Generally in tort and in breach of contract actions taxes are not considered in assessing damages. The cases are collected in 63 A. L. R. 2d 1393 and 1433. In Cereal Byproducts Co. v. Hall, 1958, 16 Ill. App. 2d 79, 147 N. E. 2d 383, the court held that an income tax refund received by plaintiff as a result of embezzlements should not be considered in mitigation of damages for defendants' failure as auditors to uncover the embezzlements:

> "... On defendants' theory every suit for damages would necessitate consideration of the income taxes saved by the plaintiff on account of the loss and the taxes payable on account of the recovery. The same principle applies as would apply in the event plaintiff had carried insurance against these embezzlements. Neither payments by the insurance carrier nor tax refunds can mitigate defendants' liability. The insurance carrier would have an interest in the recovery from the defendants just as the federal government has a tax interest in the recovery by plaintiff. We think that the court erred in giving defendants credit for the income tax refund."

In the trial on the separate issue, the late Judge Goodrich said: "Things which happen later and let an injured plaintiff escape some of the ultimate consequences of the wrong done him do not inure to the benefit of the defendant. . . ." 185 F. Supp. 826 at page 829, supra. The tax consequences are extraneous to the damage caused by United, and are not a part of the calculations.

Consumer Price Index. There is no price index for shoe machinery. Dr. Corson testified that the Consumer Price Index was not proper for the conversion of shoe machinery prices because the index is constructed to measure commodities that wage earners and clerical workers "purchase as their cost of living" such as food, clothing, toys and the like; and that a more precise index would be a "leasing cost index," which would "relate the prices of shoe machinery in 1955 to hypothetical prices—because that's what we are dealing with—in the earlier years as the rentals in 1955 varied in earlier years." He did not detail the mathematics, but estimated under this index an increase by 20 percent of the excess of cost of ownership over cost of leasing, calculated after the inclusion of the omitted elements. His work papers showed that the computed net cost of ownership was $71,000 less than that arrived at through application of the Consumer Price Index. If the index were the only matter in issue, and Dr. Corson's index were used, Hanover would be entitled to an additional $71,000. However, through application of the omitted elements, this index produced a result by which a computed excess of cost of ownership over cost of leasing went from $949,720 to $1,169,366.*

Dr. Cyert testified that the Consumer Price Index is a reasonable indicator of the general price level and the general trend of prices, since it is based on a measure of the cost of living for a large segment of our society, and while there is no measure for everything that happens in our many dimensioned society, the index was reasonable and a proper one for this case. The Consumer Price Index resulted in a relationship of 1939 prices to 1955 prices of 51.9 percent.

* Using the Consumer Price Index and including the omitted elements, Dr. Corson has computed an excess of ownership costs over leasing costs of $949,720.

Using a leasing cost index based on the 20 major machines in the damage calculation, the percentage was 52.9. And with an index developed from United's prices for its optional machines the percentage exceeded 51.9 only in the case of two of the 58 listed machines. The application of the Consumer Price Index was proper.

Expert Testimony. It is not clear whether United contends that expert testimony was necessary to prove all elements of the calculations. Whether expert opinion is required is a matter within the discretion of the court. Conry v. Baltimore & O. R. Co., 3 Cir. 1953, 209 F. 2d 422. Expert testimony is permitted if the court determines it is necessary to aid the fact finder in a full understanding of the issues. Steward v. Atlantic Refining Co., 3 Cir. 1957, 240 F. 2d 715. Expert testimony to support the calculations was supplied to the extent needed. Dr. Cyert gave his opinion on the propriety of certain elements used in or omitted from the calculations. The adverse opinion of Dr. Corson clearly defined the issues, so that the court is in a position to decide them. United's criticism of the testimony of Dr. Cyert is not supported by the record. Moreover, the underlying factual data was proved, and the assumptions on which the calculations were prepared were reasonable.

In William Goldman Theatres, Inc. v. Loew's, Inc., E. D. Pa. 1946, 69 F. Supp. 103, *aff'd per curiam,* 3 Cir. 1948, 164 F. 2nd 1021, *cert. denied,* 1948, 334 U. S. 811, 68 S. Ct. 1016, 92 L. Ed. 1742, the trial court said:

> ". . . Naturally, the plaintiff could offer no record of past performance at the Erlanger. The defendants' wrongful conduct precluded it from doing so. In its place, the plaintiff produced complete data showing the business done and profits earned at each of the other first-run theatres in Philadelphia, including

the nearby Mastbaum, during the damage period. Is this evidence sufficient? . . .

"I do not pretend that there is not an element of speculation or guesswork in making an estimate of probable profits on the evidence presented. The fact, however, that only approximate accuracy is required by the decisions of the Supreme Court indicates that no one expects the impossible and that every estimate of what would have occurred under hypothetical conditions is bound to contain elements of speculation. But the evidence, I think, is sufficient on which to reach a reasoned conclusion the basis of which is relevant, informative and logically significant data."

The damage calculations, subject to an adjustment for interest and to the elimination of certain machines, provide an approach and rational basis for a reasoned conclusion.

SUPREME COURT, U. S.

FEB 28 1968

JOHN F. DAVIS, CLERK

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1967

No. 463

UNITED SHOE MACHINERY CORPORATION,
*Petitioner,*

*v.*

THE HANOVER SHOE, INC.,
*Respondent.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

## REPLY BRIEF FOR PETITIONER

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## TABLE OF CONTENTS


| | PAGE |
|---|---|
| SUMMARY OF ARGUMENT | 1 |
| 1. WHAT THE GOVERNMENT SUIT DECIDED AND THE APPLICATION OF CLAYTON ACT § 5(a) (Hanover Points I and III) | 4 |
| 2. FAILURE TO CERTIFY THE QUESTION OF WHAT THE GOVERNMENT DECREE DECIDED (Hanover Point II) | 11 |
| 3. DIRECTNESS OF ANTI-COMPETITIVE IMPACT (Hanover Point IV) | 13 |
| 4. RETROACTIVE APPLICATION OF GOVERNMENT DECREE (Hanover Point V) | 14 |
| 5. COST OF CAPITAL (Hanover Point VI) | 16 |
| 6. ABSENCE OF DEMAND (Hanover Point VII) | 18 |
| 7. PASSING-ON OF LEASE COSTS (Hanover Point VIII) | 22 |
| 8. LIMITATIONS (Hanover Point IX) | 23 |
| CONCLUSION | 26 |
| APPENDIX A | 1a |
| APPENDIX B | 2a |


## TABLE OF CASES


| | |
|---|---|
| *American Crystal Sugar Co.* v. *Mandeville Island Farms, Inc.* 195 F. 2d 622, cert. denied 343 US 957 | 23 |
| *American Tobacco Co.* v. *United States* 328 US 781 | 3, 14-16 |
| *Anniston Mfg. Co.* v. *Davis* 301 US 337 | 23 |
| *Bruce's Juices, Inc.* v. *American Can Co.* 330 US 743 | 25 |
| *Chattanooga Foundry & Pipe Works* v. *City of Atlanta* 203 US 390 | 23 |
| *Continental Ore Co.* v. *Union Carbide & Carbon Corp.* 289 F. 2d 86, rev'd 370 US 690 | 22 |

PAGE

*W. B. Coon Co.* v. *United Shoe Mach. Corp.* WDNY Civil No. 6841, dismissed April 12 1963 ....2, 12, 18, 21

*Gulf Oil Corp.* v. *Gilbert* 330 US 501 ..... 12

*James* v. *United States* 366 US 213 ..... 10

*Keogh* v. *Chicago & N. W. Ry.* 260 US 156 ..... 23

*Peto* v. *Madison Square Garden Corp.* 384 F. 2d 682 .. 25

*Ross* v. *Oregon* 227 US 150 ..... 10

*Straus* v. *Victor Talking Mach. Co.* 297 Fed. 791 .... 23

*United States* v. *Aluminum Co. of America* 148 F. 2d 416 .....3, 14-16

*United States* v. *Grinnell Corp.* 236 F. Supp. 244, aff'd 384 US 563 ..... 11

*United States* v. *Harriss* 347 US 612 ..... 10

*United States* v. *United Shoe Mach. Co.* 222 Fed. 349, aff'd 247 US 32.....15-16

*United States* v. *United Shoe Mach. Corp.* 110 F. Supp. 295, aff'd *per curiam* 347 US 521 .....5-11, 14, 19

---

**STATUTES**

---

Clayton Act

§ 4, 38 Stat. 731 (1914), 15 USC § 15 ..... 23

§ 5(a), 69 Stat. 283 (1955), 15 USC § 16(a) .... 2, 6

Sherman Act § 2, 26 Stat. 209 (1890), as amended 69 Stat. 282 (1955), 15 USC § 2 ..... 11

28 USC § 1404(a) ..... 12

United States Constitution, Article I § 9(3) ..... 10

## OTHER AUTHORITIES

PAGE

Anthony, Shoe Machinery: Buy or Lease? (Rev. ed. 1955) ..... 17

House of Representatives Report No. 422, 84th Cong. 1st Session (1955) ..... 24

Pollock, *Standing to Sue, Remoteness of Injury, and the Passing-On Doctrine,* 32 ABA Antitrust L. J. 5 (1966) ..... 13-14

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Senate Report No. 619, 84th Cong. 1st Session (1955) 24

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## REPLY BRIEF FOR PETITIONER

Since most of Hanover's contentions on this petition are anticipated in our main brief, reference is made in this reply only to assertions which demand further comment and to significant admissions.

### SUMMARY OF ARGUMENT

*Hanover Point I.* Contrary to Hanover's claim, a finding that the Government decree constituted an adjudication that leasing without selling ("lease-only") had been unlawful under the Sherman Act is essential to Hanover's recovery, as there is no other evidence of monopolization. Judge

Wyzanski made no such adjudication but carefully limited his determination of illegality to four specified lease clauses. Hanover's attempted distortion of his holding by ambiguous use of the phrase "lease-only policy" does not satisfy the requirements for *prima facie* status under Clayton Act § 5(a).

*Hanover Point II.* As to United's application for a certification to Judge Wyzanski, the ground of untimeliness which alone determined the Court of Appeals action is completely unsound in the circumstances as well as accomplishing grave injustice. There is ample authority for the certification procedure and the failure of the courts below to certify the crucial issue was an abuse of discretion in light of the conflicting decision of Judge Burke in *Coon* and Judge Wyzanski's statement that his own decision was misinterpreted by Judge Sheridan. In fact Judge Wyzanski's awareness of this Court's concern for eliminating conflicts prompted him to encourage United not only to request certification but to petition for certiorari if the Court of Appeals accepted Judge Sheridan's construction of the decree.

*Hanover Point III.* It is not disputed by Hanover that to warrant giving *prima facie* effect to the decree the "lease-only policy" of United must be shown to have been necessarily adjudicated to be illegal in the Government case. The legality of the lease-only policy (in the only proper meaning of a refusal to sell) was by no means adjudicated, indeed scarcely discussed in the basic Government case.

*Hanover Point IV.* As to target area Hanover stresses a privity concept which is quite irrelevant. The issue is whether Judge Wyzanski, on whose decree Hanover relies, found shoe manufacturers like Hanover to have sustained the direct anti-competitive impact of the illegality determined, and it is clear that he did not.

*Hanover Point V.* It is tacitly conceded that, assuming lease-only *per se* was found by Judge Wyzanski to be a crime, it would be improper to give such holding retroactive effect to the extent that it represented a change in the law and there was reliance on the earlier, different law. Hanover simply argues there was no change in the law and no reliance, an argument plainly refuted by *Alcoa, American Tobacco* and the earlier decisions of this Court dealing with the very business policy of United here in issue.

*Hanover Point VI.* Hanover does not deny that in 1955 it applied a test equivalent to cost of capital in deciding whether to lease or purchase United's machines. Hanover stresses that it made substantial purchases in 1955, without revealing that the purchases were of used machinery at substantial discounts and that the alternative would have involved lease charges substantially higher than those in effect during the period at bar.

*Hanover Point VII.* Against the findings that it neither demanded the right to purchase nor protested its inability to do so, Hanover rests on the concept of futility of demand. But there is no evidence that a demand would have been useless and the proof in fact shows that Hanover never failed to assert itself when it felt aggrieved and that it was quite content to continue leasing until after the Government decree. Elimination by the courts below of the requirement of a demand to sell in a suit based on alleged refusal to sell as a crime, is clearly erroneous.

*Hanover Point VIII.* Whether putative savings from a hypothetical purchase alternative should be trebled and awarded as damages where any dollar injury to Hanover was passed on to the purchasers of its shoes was not decided by Judge Goodrich, who dealt only with the stipulated assumption of excessive rentals which the courts below sub-

sequently rejected. By shifting the burden of any allegedly excessive payment to its purchasers Hanover lost its right to claim actual injury.

*Hanover Point IX.* As to limitations, the essential point, ignored by Hanover, is that the basis for the liability found is failure to sell, which admittedly existed at all times, i.e. both before and after the cut-off date for the bar of limitations. New causes of action thereafter cannot be accrued (contrary to the Court of Appeals holding) simply by United's entering into new leases at Hanover's request or collecting rentals lawfully called for by such leases. If the statute is to have any content it must run from the commencement of United's claimed refusal to sell.

## 1. WHAT THE GOVERNMENT SUIT DECIDED AND THE APPLICATION OF CLAYTON ACT § 5(a) (Hanover Points I and III)

While Hanover claims that "there was other substantial evidence of monopolization" besides the Government decree (br. 15), the evidence which Hanover summarizes by footnote goes solely to the issue whether United had monopoly power—not to the issue whether the policy of leasing without selling was an exclusionary monopolizing practice. Neither court below referred to any evidence apart from the Government decree that this policy was at all exclusionary. There is no such evidence in the record, nor has Hanover ever claimed there was. Thus the decree in the Government suit is the only record evidence which can be claimed to support the holding below that United's policy of leasing but not selling was a means of monopolization.[1]

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[1]Even if there were evidence in the record tending to show that this policy was a monopolizing practice, the holding that it constituted monopolization could not be affirmed on such evidence, since both courts below relied solely upon the Government decree.

The error or correctness of that holding is a vital and determinative issue on this appeal. Hanover's answer in its Points I and III to our argument as to the interpretation of the decree (our main br. 27-41) is vitiated by its persistent confusion in the use of the shorthand term "lease-only". We have used the term "lease-only" to denote a distribution by leasing exclusively which necessarily connotes the failure to sell.[2] That is, we have used "lease-only" to mean a leasing system which excluded sales, and have urged that the exclusion of sales was not in itself adjudged a violation in the Government suit.

Judge Wyzanski, when characterizing United's method of distribution with this feature in it, never picked out the absence of sales as a violation but always associated as the antitrust offenses the exclusionary elements of the leasing system—that is, those which kept competitors out. Thus, in what we believe to be his only use of the term "lease-only" Judge Wyzanski said:

> "Much of United's market power is traceable to the magnetic ties inherent in its system of leasing, and not selling, its more important machines. The lease-only system of distributing complicated machines has many 'partnership' aspects, and it has exclusionary features such as the 10-year term, the full capacity clause, the return charges, and the failure to segregate service charges from machine charges." (110 F. Supp. at 344, quoted at Hanover br. 19)

Elsewhere Judge Wyzanski also showed the four restrictive elements of the (exclusive) leasing system, rather than its concomitant absence of sales, to be the object of his concern:

> "If the matter were *res integra,* this Court would adopt the first approach, and, as a preliminary step to

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[2]One cannot say "refusal" to sell since there were no demands.

> ruling upon § 2, would hold that it is a restraint of trade under § 1 for a company having an overwhelming share of the market, to distribute its more important products only by leases *which have provisions* that go beyond assuring prompt, periodic payments of rentals, which are not terminable cheaply, which involve discrimination against competition, and which combine in one contract the right to use the product and to have it serviced. But this inferior court feels precluded from so deciding because of the overhanging shadows of United States v. United Shoe Machinery Co. of N. J., 247 U. S. 32, 38 S. Ct. 473, 62 L. Ed. 968, and United Shoe Machinery Corp. v. United States, 258 U. S. 451, 42 S. Ct. 363, 66 L. Ed. 708, the Sherman and Clayton Act cases involving this company's predecessor and itself. . . ." (110 F. Supp. at 343; emphasis supplied)

What Hanover has to do in order to read the Government decree in its favor with the *prima facie* effect of Clayton Act § 5(a) is to show Judge Wyzanski's holding to be a flat condemnation of the failure to sell in itself. This it tries to accomplish by picking "lease-only" out of the language above quoted, stripping away the restrictive practices which were the object of Judge Wyzanski's concern, and employing it like a rubber stamp to convey the impression that condemnation of refusal to sell was the essence of the holding. This is done by the use of "lease-only" 15 times in Points I and III of the Hanover brief (including quotations).

Elsewhere Hanover describes the distribution policy held unlawful by Judge Wyzanski more correctly as the "lease-only policy as practiced" by United (br. 9, 16, 23, 24, 25). This focuses on the four restrictive lease provisions found by the court to be means of monopolization

(decree par. 4). It is United's "leasing system as practiced" which Government counsel attacked on the 1954 argument before this Court, as contrasted with leasing *per se* which they did not attack (our main br. 11-12).

Hanover's argument (br. 41) that

> "Lease-only gives full effect to the operation of the restrictive clauses and is the cement that binds together the violation"

is contradicted by the two crucial points of Judge Wyzanski's decision to which we have already called attention. One is the statement equating short leases with ownership as to lack of exclusionary impact (our main br. 30). The other is the statement that the antitrust laws are not designed to give a customer choice as to his supplier's selling method (our main br. 41). These two holdings are fatal to Hanover's argument.

It is of course true that the absence of sales is a part of the leasing practice, and it is this which Hanover claimed to be an injury to it. But the question before the Court is whether Judge Wyzanski in his decision, which is the cornerstone of Hanover's recovery, held distribution by leasing without alternative sales (i.e. lease-only) to be an antitrust violation, or whether on the other hand he limited his adjudication of violation to the restrictive practices condemned in decree par. 4. That the latter is clearly the case is shown by—

(i) the total absence in Judge Wyzanski's long opinion and decree of any statement that lease-only by itself was a violation.

(ii) his equating of short-term leases with ownership and his pointed observation that the antitrust laws are not designed chiefly, if at all, to give a customer choice as to his supplier's selling methods (our main br. 30, 41).

(iii) the breadth of the provision in the Government decree dismissing other charges on the merits, together with the Government's specification in its complaint of United's declination to sell as one of the offenses charged (our main br. 28-29). Hanover's labored argument that this dismissal also covered other charges (br. 22) does not remove par. 61 from the scope of the dismissal.

(iv) the statement by Government counsel, Mr. Timberg, on the closing argument before Judge Wyzanski that the relief the Government sought was not coextensive with any liability determined:

> "Such remedial relief does not depend upon the evaluation of the gravity or culpability of the individual practices engaged in by the defendant, and is not geared into such an assessment or evaluation." (A. 121).

(v) the declaration of Government counsel during the argument before this Court in 1954 that what they attacked was not leasing *per se* (what we call lease-only) but "this leasing system as practiced" (our main br. 11-12; Hanover br. app. 2a-3a).

(vi) the very plain intimation by Judge Wyzanski, when the Hanover problem was brought before him in 1965, that the Government never contended, and he (Judge Wyzanski) never ruled, as Judge Sheridan supposed the matter was decided (our main br. 19-21). Hanover's contemptuous reference to what Judge Wyzanski "did or did not have in the back of his mind . . . twelve years before" (br. 8-9) is a quite unfair presentation of the matter.

Hanover has no answer to these points. While it asserts that Judge Wyzanski "adjudicated the illegality of the policy", the "specific language" quoted for this assertion

(br. 18-20) contains no such adjudication. Moreover, Hanover omits any reference to the passages in which Judge Wyzanski carefully listed the aspects of United's leases which he found to be exclusionary, 110 F. Supp. at 297, 340, presumably because neither list includes lease-only. Nor has Hanover essayed any explanation why, if lease-only was held to be monopolization, par. 4 of the decree did not declare it to be a means of monopolization (see p. 28 of our main brief).

Significantly, Hanover has not attempted to suggest any reason why Judge Wyzanski might have found the lease-only policy to be an exclusionary monopolizing practice. Hanover has not even sought to defend the reasons suggested by the Court of Appeals—the psychological impact of leasing and the role of a second-hand market (discussed at pp. 31-32 of our main brief). Nor has Hanover attempted to meet the fact that the record in the Government suit contained no evidence to indicate that lease-only had an exclusionary impact in the absence of the four lease clauses found to be exclusionary.[8] (See p. 32 of our main brief.)

Hanover concedes (br. 23) that relief in a Government antitrust case must often "go beyond the limits of proven violation", but argues that Judge Wyzanski was not applying this rule when he enjoined lease-only for the future because the cases which did so "clearly recognized and made explicit that the relief ordered went beyond the violations charged", whereas Hanover says that Judge Wyzanski was not thus explicit. Hanover ignores the fact that the extensive discussion of the advisability of prohibiting

[8]The only contention made by the Government at the close of the evidence with respect to United's leases was that the four allegedly exclusionary clauses constituted monopolization. The Government's Requests for Findings of Fact and Conclusions of Law, pp. 581-94, confined themselves to these four clauses.

lease-only for the future, from which the last of its three lengthy quotations at br. 18-20 is drawn, is found not in the section of the opinion on Alleged Violations (as Hanover incorrectly states at br. 18) but rather in the *Opinion on Remedy*. The fact that the provision of the decree barring lease-only for the future went beyond the violations found by Judge Wyzanski also appears from his careful weighing of the wisdom and fairness of such a provision in his Opinion on Remedy. If lease-only had been found in itself to be a violation of the antitrust laws, it would have been summarily enjoined without discussion. Instead of carefully considering in his Opinion on Remedy United's contention that such a provision in the decree would discriminate against United and in favor of other shoe machinery manufacturers, as he did at 110 F. Supp. 350, Judge Wyzanski would simply have declared lease-only a violation of law.

In view of the previously existing interpretation of the Sherman Act, however, and United's prior judicial record lease-only could not have been declared a Sherman Act violation for the period preceding the Government decree for constitutional reasons. The Constitution in Article I, § 9(3) forbids Congress to pass *ex post facto* laws. While this prohibition is apparently not applicable to the judiciary (*James* v. *United States* 366 US 213, 247-48 [Harlan, *J.*, dissenting in part]; *United States* v. *Harriss* 347 US 612, 635 [Jackson, *J.*, dissenting]; cf. *Ross* v. *Oregon* 227 US 150, 161), the re-interpretation by the courts of an existing Act of Congress so as to make criminal that which previously had been construed as lawful would draw in question the constitutional rule against *ex post facto* lawmaking. Cf. *James* v. *United States* 366 US 213, 221, holding that an income tax declaration conforming to the statute as construed by this Court lacks the necessary ele-

ment of willfulness to sustain a conviction upon a change in the law by the overruling of such construction. Sherman Act § 2 makes monopolization a crime. While the question of intent in respect of monopolizing was resolved by Judge Wyzanski on the principle that defendant, having willed the means, had willed the end (110 F. Supp. 346), this reasoning would support only injunctive relief. It would not suffice to turn into a crime that which was not a crime before the decision. That Judge Wyzanski realized this is further shown by his comment on the developing construction of the Sherman Act in *United States* v. *Grinnell Corp.* 236 F. Supp. 244, 247-8 (D. R. I. 1964), aff'd 384 US 563.

We conclude that in the case at bar Judge Wyzanski could not have intended to denounce lease-only as a crime in the period preceding his decision, even though he prohibited it for the future (decree par. 5, 110 F. Supp. at 352). Thus Hanover has utterly failed to show, as admittedly it must (our main br. 38-41; Hanover br. 31-32), that the unlawfulness of lease-only was a necessary implication therefrom.

**2. FAILURE TO CERTIFY THE QUESTION OF WHAT THE GOVERNMENT DECREE DECIDED (Hanover-Point II)**

Surely the greater the doubts as to whether lease-only was itself held by Judge Wyzanski to constitute monopolization, the more vital was direct reference of the question to him in accordance with the procedure which Judge Wyzanski himself suggested (A. 138).

Hanover argues (br. 26-28) that United's motion for certification would have been timely only if made "at an early stage in proceedings before the" Middle District of Pennsylvania (p. 26), without attempting a serious answer to the point that it could not then be determined whether the

interpretation of the Government decree would prove decisive (see our main br. 36-37). Hanover's contention that absence of a Federal statute or rule on certification is fatal (br. 26-27, 30) is refuted by this Court's certification of state-law questions to state courts without invoking any Federal statute or rule (see our main br. p. 35); and analogy may also be drawn to the Court's holding before the passage of 28 USC § 1404(a) that Federal courts had inherent power to compel the bringing of an action in another forum under the doctrine of *forum non conveniens* although no Federal statute or rule provided for such a procedure. *Gulf Oil Corp.* v. *Gilbert* 330 US 501.

The attempt to dismiss the earlier, conflicting *Coon* case as a mere "failure of proof by a bankrupt plaintiff" (br. 25, 29-30) beclouds the truth. District Judge Harold P. Burke specifically held that:

> "2. Any acts of the defendant held by the court in United States vs. United Shoe Machinery Corp. to be in violation of the antitrust laws were not the proximate cause of any injury to the business or property of W. B. Coon"

and that

> "6. Defendant's policy of lease-only as to certain machines during the period 1939 through 1954 was not by itself illegal." (A. 273)

This ruling was exactly in point on the question of law identical in the two cases, viz., the relationship of the Government decree to the treble damage complaint. The decree was the same, and the complaints were identical in all material respects (compare A. 5-20 with A. 252-66). Talk about the bankruptcy of the plaintiff Coon or the scope of the proof is obfuscation.

Hanover's recitation (br. 29) that a "search" of the colloquy between counsel and Judge Wyzanski revealed to Judge Sheridan nothing to cause him to change his construction of the Government decree flies in the face of Judge Wyzanski's plain statement that "the government never contended, and I never ruled, as Judge Sheridan supposes the matter was decided". (A. 142) The conflict cried out for resolution and it is little wonder that, while on comity grounds he refused formally to intrude his views (A. 148-50), Judge Wyzanski saw fit to add:

> "There are available remedies by way of appeal certainly to the Court of Appeals for the Third Circuit; and if by any chance that Court should affirm the Decree of the District Court, this would appear to be the kind of case in which the Supreme Court of the United States might well indulge its power to grant a petition for certiorari." (A. 149)

**3. DIRECTNESS OF ANTI-COMPETITIVE IMPACT (Hanover Point IV)**

Contrary to Hanover's suggestion at br. 1-2 and 33, the target-area issue is "fairly comprised" within Question Presented No. 1 (our main br. 3) and in fact the very same point was argued by United in the Court of Appeals under a similar "question presented" (Appellant's Brief pp. 1, 13-28).

In its target-area argument Hanover repeatedly dwells upon its "direct business relationship" with United (br. 34-35), as though the issue were whether it stood in privity with United. That is not the point. The real issue is whether Hanover was one of those found by Judge Wyzanski to have sustained the direct anti-competitive impact of the violations he found. Pollock, *Standing to Sue, Remoteness of Injury, and the Passing-On Doctrine*, 32 ABA Anti-

trust L. J. 5, 16-19 (1966). Perhaps recognizing this, Hanover attempts to demonstrate that it was a target of the violations Judge Wyzanski found; but it ignores Judge Wyzanski's explicit statement that

> "For present purposes it may be assumed that the anti-trust laws are not designed, chiefly, if at all, to give a customer choice as to the selling methods by which his supplier offers that supplier's own products." 110 F. Supp. at 349-50, quoted at our main br. 41.

In toiling over this problem of impact, the courts below have been extraordinarily blind to the simple, admitted facts of the case at bar. For instance, the district court was able to conclude that "Hanover was 'aimed' at and 'hit' " (245 F. Supp. at 275, A. 54) in flat disregard of the statement of Hanover's President Sheppard that he was satisfied with the leasing system (p. 19 below).

**4. RETROACTIVE APPLICATION OF GOVERNMENT DECREE (Hanover Point V)**

Again, as in its brief in No. 335, Hanover does not appear to contend for retroactivity *if* there was a change in the law and reliance on the prior law. Hanover nails its colors to the proposition (br. 41-42, 53) that there has been no change in the law and adds (br. 42) that there was no showing of reliance by United on any different earlier law.

Hanover attributes to United (br. 41) the argument that "due to this claimed earlier approval" of United's leases by this Court the decisions in *Alcoa* and *American Tobacco* did not put United on warning. The fact is that, while the prior judicial approval of United's leases gave it a unique position as regards change in the law, even in

the absence of such approval *Alcoa* and *American Tobacco* would not have put United on notice. The Court will note that, even after and in the light of Judge Wyzanski's findings, the Middle District of Pennsylvania did not impose liability in respect of the leases, accepting their lawfulness and the reasonableness of the rentals (245 F. Supp. at 275-76, A. 55-58). Liability was based on the wholly novel idea that the lessee was entitled to a purchase alternative which neither it nor any other customer demanded, and that the saving indicated by comparing the aggregate reasonable rentals with a constructed purchase price could be treated as damages reflecting "injury" to the previously satisfied customer. Nothing in *Alcoa* or *American Tobacco* gave warning of such an innovation.

The charge (br. 38-39) of misleading quotation from Mr. Justice McKenna in the 1918 case, 247 US 32, 63, is answered by simply reading the full quotation in the footnote on page 39 of Hanover's brief. Moreover, the pages of his opinion following the quotation make it clear that Mr. Justice McKenna was concerned with whether the leases were an illegal restraint, not with whether such a restraint was the purpose for which United was organized. This is most evident from the conclusion of the discussion of leases, 247 US at 66:

> "However, we need not dwell further upon the leases. It approaches declamation to say that the lessees were coerced to their making. . . . There is no question in the case of the use of circumstances to compel or restrain . . . ."

Hanover claims to be "unable to follow" the point that approval of such clauses of United's leases as the full capacity clause, which this Court upheld in the 1918 case, necessarily implies approval of the lease-only policy (br. 39-40). The point is self-evident: if lease-only were

monopolization, lease-only plus lease clauses would *a fortiori* be monopolization; therefore this Court's holding in the 1918 case that lease-only plus the lease clauses there involved was not monopolization necessarily comprehends the holding that lease-only was not monopolization. It was especially in light of this Court's earlier *United* decisions that the Court of Appeals, like Judge Wyzanski, found in *Alcoa* and *American Tobacco* a clear change in the law (377 F. 2d at 787-90, A. 204-09).

As to Hanover's argument that "there is no claim in this record of reliance by United on counsel" (br. 42), the Court of Appeals held that "it is appropriate to recognize that businessmen must rely upon counsel, who in turn are guided by the existing precedents in making difficult decisions on the effect of the antitrust laws on specific business conduct" (377 F. 2d at 789, A. 207). That finding of reliance coincides with the conclusion recently expressed by Judge Schaefer:

> "To inject into every case an added requirement that individual reliance be proved, would seriously complicate the judicial process. Our legal system operates generally upon an assumption of knowledge of the law, and in most of the cases in which the issue arises, reliance seems obvious." *The Control of "Sunbursts": Techniques of Prospective Overruling*, 22 N. Y. City Bar Assn. Record 394, 407 (1967).

**5. COST OF CAPITAL (Hanover Point VI)**

Nowhere is there even an attempt to answer the point that Hanover in 1955 applied a test equivalent to cost of capital in deciding whether to lease or purchase machines

from United (our main br. 55-56, 61).[4] The finding stressed by Hanover (br. 45) that it "would have purchased" is meaningless even if it is a finding[5], since it is based on an erroneous legal standard ignoring cost of capital. Hanover's expert Dr. Cyert freely conceded that a calculation using cost of capital "is perfectly proper as an aid to decision-making" (A. 546, 562), i.e. at the times Hanover would have had to decide whether to purchase or lease.

The "substantial purchases" of used machinery in 1955 which Hanover stresses (br. 5, 45) are without probative value for two reasons. *First*, the alternative to purchasing this used machinery in 1955 was payment of the newly instituted Form B lease charges (see A. 649-50), which were substantially higher than the Form A lease charges in effect throughout the period involved in this case (for example, 32% higher for one group of machines leased by Hanover,

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[4]The statement at p. 55 of our main brief that the "recoupment period is the exact reciprocal of the return to Hanover of its investment in the machine" requires a minor correction to be completely accurate. Since the savings expected in future years must be discounted by the cost of capital to arrive at their present worth to Hanover, the actual return is somewhat less than the reciprocal of the recoupment period. Anthony, *Shoe Machinery: Buy or Lease?*, at 19-23 (Rev. ed. 1955). This adjustment, however, does not affect the vital fact that the recoupment period method used by Hanover is almost exactly equivalent to the cost of capital method, both being determined by the same considerations.

[5]The statement of the District Court, which the Court of Appeals treats as a finding, that "Hanover . . . was unable to purchase most of the important machines which it would have purchased had they been available" (377 F. 2d at 781, A. 189, quoted at br. 45) is *not* a finding that Hanover would have purchased most of the more important machines. By virtue of the structure of the sentence, it is merely a statement that Hanover could not buy those of the machines that it would have bought. The controlling and only finding of the District Court about Hanover's possible purchase in the damage period is: "Hanover need not show that in any and all cases it would have purchased, but that it *likely* would have purchased the machines." (245 F. Supp. at 280, A. 66; emphasis supplied)

Def. Ex. 33 [admitted R. 548], p. 44). *Second,* the used machinery purchases of 1955 were induced by the abnormally favorable discounts made available by the Plan for Terminating Form A Leases, which provided reductions of 12% to 85% from the purchase price new for the used machinery involved.[6]

Judge Burke's dismissal of the parallel claims of the plaintiff in the *Coon* case was based upon the finding, among others (A. 271), that there was "no evidence of the cost of capital or required return on investment to W. B. Coon Co. if the said company had used its own funds to purchase machines held on lease."

**6. ABSENCE OF DEMAND (Hanover Point VH)**

The Court of Appeals noted that the trial court had found that Hanover never asked United to sell the machines nor protested its inability to buy them from United. Hanover does not contest these findings. It emphasizes however (br. 48) the trial court's further finding, also noted by the Court of Appeals, that Mr. Sheppard testified that any request to buy would have been a "foolish question", which "explanation" the trial court thought not unreasonable "in view of the findings in the Government case and the evidence in this case" (245 F. Supp. at 280, A. 66; 377 F. 2d at 781, A. 190). The Court of Appeals said that what Mr. Sheppard characterized as foolish "amounts to a futile gesture which the law does not require" (377 F. 2d at 781, A. 190).

Thus it is *admitted* that no demand was made to exercise the right on the deprivation of which enormous damages have been built. The attempt is to excuse demand for futility. But there is no evidence in the record that a demand

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[6]The discount table is set forth on the last page of the Plan for Terminating Form A Leases, Def. Ex. 35 [admitted R. 392]. A copy of this page is attached as Appendix A to this brief.

would have been useless. Aside from quoting the self-serving and unresponsive counter-question of Hanover's President about a "foolish question" (our main br. 59, n. 14), both the trial court and the Court of Appeals confine themselves to editorial comment on the findings of Judge Wyzanski. But that judge in summarizing 14,000 pages of record did not find that a demand to buy would have been futile. He found, with repeated descriptive detail, that all lessees were satisfied to lease, rather than to purchase, their machinery.[7] Mr. Sheppard, President of Hanover, expressed to United's attorneys willingness to testify on behalf of United in the Government suit (A. 340). When asked at an interview in 1950 whether he objected to leasing machines from United, Sheppard said:

> "The only objection I have to leasing is the fact that you lease to everybody." (A. 341)

He protested against United's practice of assisting the local chamber of commerce to set up new plants inasmuch as

> ". . . by giving them the machinery it would allow fly-by-night outfits to come in here and upset his [Sheppard's] labor market." (*Ibid.*)

Mr. Sheppard was not at all timid in the assertion of his rights. So far from belonging to what the trial court, in its poetic phrase quite unsupported by the record, called "captive customers of United" (245 F. Supp. at 280, A. 66), he was vigorously independent. When United took a position about the coverage of its leases with which Sheppard disagreed, he refused to sign the disputed lease and

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[7] We again refer to the testimony in the record formerly before this Court as to the complete satisfaction with the leasing system of every witness who appeared in the Government antitrust case (our main br. 14). The court was convinced of the lessees' "long-term, satisfactory relations with United" (110 F. Supp. at 344).

"was successful in his fight with United" (Chester Ward at A. 341; Sheppard at A. 309-10).

If therefore the scattered comments of the courts below about "captive customers" as being tantamount to futility of demand do constitute "findings", on the entire evidence they are clearly erroneous.

In a glancing way Hanover tries to give the impression that the trade association effort, in which it participated, to persuade United to offer more of its machinery for sale, an effort represented by certain correspondence exchanged toward the end of 1950 (Pl. Ex. 24 and 25 [admitted A. 479-80], A. 609-18), either was a demand or showed futility of demand. The exact opposite is the case, and the Court's attention is invited to this correspondence and its sequel. It shows that the National Shoe Manufacturers Association, by a committee of which Hanover's President Sheppard was a member, did *not* request the purchase of any particular machines, but only asked for consultation "with a view to selecting certain machines" then offered on a lease basis only and putting them on a basis of optional lease or purchase (A. 613).[8]

If a request to buy was a "futile gesture" as the Court of Appeals said, the nine experienced members of the NSMA Committee certainly did not know it.

United, rather than repudiate the NSMA request, merely asked in effect for a postponement of the discussion until the pending Government antitrust suit was completed (A. 616). So far as the record shows, this was the end of the matter. The NSMA committee requested a discussion and were satisfied with its postponement. They made no demand, they asserted no rights of purchase, they made no

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[8]We again call attention to the fact that out of the existing list of optional terms machines, which before 1955 were the less important ones, Hanover voluntarily elected *to lease rather than purchase 136* (our main br. 5-6).

proclamations of antitrust violation even though they knew the Government was charging monopolization.

The committee's acceptance of the situation goes even further. Charles H. Jones, Jr., chairman of the committee of nine including Mr. Sheppard (A. 615), testified that the committee could not agree on the list of machines to be selected for optional purchase. The committee's secretary, W. W. Stephenson, urged its members to make a list of machines which their companies desired to purchase (A. 608), but the chairman testified that no such list was ever made. Differences arose between the larger and the smaller companies as to what would be desirable for the industry as a whole, and as to the smaller manufacturers Mr. Stephenson felt "there would be a question of the desirability of how many machines or how broad they would wish to have the choice of lease or purchase at the option of the individual company".[9]

Relevant to this NSMA negotiation and the absence of demand is the finding of Judge Burke in the *Coon* case (A. 269-70), after examining Judge Wyzanski's findings in the Government suit and reviewing the advantages to shoe manufacturers of the leasing system:

> "12. There is no evidence that W. B. Coon Co. *or any other shoe manufacturer* was dissatisfied with the defendant's leasing system in effect up to February 18, 1953, the date of the decree in United States vs. United Shoe Machinery Corp. . . . ." (Emphasis supplied.)

This finding is reinforced by Defendant's Exhibit 73 [admitted R. 1905] (facing A. 672) demonstrating the extent

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[9]Testimony of Charles H. Jones, Jr. at R. 1707. This testimony is not reproduced in the joint appendix, and R. 1702-08 are therefore reprinted as Appendix B to this brief.

to which Hanover took advantage of its right under the leases to return machines which became obsolete or unnecessary during the period 1946-55. Hanover's President named four factors of disadvantage which made him selective in new machinery purchases, including fear of obsolescence (A. 320-22).

Hanover was one of the mass of satisfied lessees. It was in exactly the position of the plaintiffs in the film cases which Hanover at br. 52 unsuccessfully tries to distinguish (our main br. 59-60, n. 15). Just as the theatre owners who had second-run films were obliged to make overt demand for first-run films as a prerequisite to suit, so Hanover as a satisfied lessee could not legally complain without having stated its demand to buy specific machines.

The absence of demand by Hanover in the damage period was impelled by the solid advantages of the leasing system. For this and the other reasons stated at pp. 58-60 of our main brief, the demand requirement is an important and functional step in litigation like the present. It should not be fudged off as a mere formality. It is not the "rigid or mechanical formula" which this Court deprecated in its discussion of the special facts of the *Continental Ore* case, 370 US at 699. In the context of this case a demand by Hanover to purchase United's machines is required in the interest of fairness. To dispense with the demand requirement is to turn Hanover's utilization of the leasing system and its expressions of satisfaction therewith into a form of entrapment.

**7. PASSING-ON OF LEASE COSTS (Hanover Point VIII)**

Hanover's reliance, like that of the courts below, is on rulings of the late Circuit Judge Goodrich (br. 54) which have turned out to be dictum as the case actually developed. His decision was on a preliminary trial and on stated as-

sumptions which he phrased as "excessive rentals for the use of shoe machinery" (185 F. Supp. at 828; cf. App. 1960 p. 25a). Upon the trial this claim of excessiveness was rejected by the District Court, and the basis of liability transferred to the quite different idea of a substituted constructed purchase price to be contrasted with the entire aggregate of annual lease payments. Hence Judge Goodrich's language related to a damage theory which is now out of the case, although Hanover hints the contrary (br. 6) on the basis of what the complaint asserted rather than the issue actually framed for preliminary trial.

This Court has not dealt with the passing-on question since its decision on an antitrust formulation of a rate overcharge in the *Keogh* case, 260 US 156, 165 (1922). Conflicting decisions in various courts of appeal arising from private antitrust cases have failed of certiorari.[10] The question is now ripe for resolution, and it is submitted that the proper rationale is that set forth in *Anniston Mfg. Co.* v. *Davis* 301 US 337, 348, that if plaintiff "has obtained relief through the shifting of its burden, he is no longer in a position to claim an actual injury . . . ." The present state of the law, whereby the passing-on defense is available if plaintiff is a "middleman" but not if he is a "consumer" (our main br. 64), reflects an ambivalence in treatment of the single word "injury" in Clayton Act § 4 which it is submitted this Court should not sanction.

**8. LIMITATIONS (Hanover Point IX).**

Hanover's answer to the statute of limitations defense, as urged at pp. 66-71 of our main brief, is simply to reiterate the "continuing monopolization" theory of the courts

[10]Our main br. 63-5. Of the eight cases from *Chattanooga* to *American Crystal Sugar* cited by Hanover at br. 56-57, in only one (*Straus*) was the passing-on question even mentioned.

below (br. 60-61). This misses the point that the basic liability underlying the award of damages is claimed refusal to sell. Hanover itself acknowledges that United's policy was the same in 1939 and in all subsequent years (br. 53). In No. 335 Hanover treats United's "monopolistic and exclusionary acts" as being "the same before and after June 10, 1946" (br. in No. 335 pp. 24, 27).

Clearly the very nature of the liability asserted demands application of the rule that limitations begin to run from the date on which plaintiff first could bring action (our main br. 68). This rule is not to be burked or aborted by the mere continuance of the practices charged, since the effect would be to repeal the statute of limitations. Yet Congress in recent years has manifested its concern with the protracted pendency of private antitrust claims by establishing in 1955 a four-year limitation, with the statement in the House and Senate reports that

> ". . . the committee . . . does not believe that the undue prolongation of proceedings of this type is conducive to effective and efficient enforcement of the antitrust laws."[11]

Sound public policy requires that litigants claiming injury be put on notice of their duty to enforce their rights promptly. Dalliance and delay should be discouraged on both private and public grounds. It is incompatible with the function of private litigants in enforcing the antitrust laws that they be allowed to postpone with impunity the prosecution of claimed wrongs which, in Hanover's admission, were identical before and during the damage period.

The Court of Appeals in dealing with this point excused Hanover's delay on the ground that the conduct of United

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[11] H. R. Rep. No. 422, 84th Cong., 1st Sess. 9 (1955); S. Rep. No. 619, 84th Cong., 1st Sess. 6 (1955).

which is penalized is not the mere re-assertion of the refusal to sell but consists of the collection of rentals on leases and entering into new leases (377 F. 2d at 794, A. 221). We have already shown that this is an indefensible ground for evading the statute (our main brief pp. 69-70), and Hanover in its brief of December 22 1967 does not attempt to defend it.

Since the leases were lawful and the rentals reasonable, the Court of Appeals' ground for treating the post-1946 leases as a violation of the antitrust law is entirely inconsistent not only with Hanover's theory of monopolization but with the teaching of this Court in *Bruce's Juices, Inc.* v. *American Can Co.* 330 US 743, 755.

The portion of the Court of Appeals opinion quoted by Hanover at br. 61, comparing "repeated and measurable invasion of a plaintiff's rights . . . both outside the statutory period and also within it" (377 F. 2d at 795, A. 221), exposes the extreme artificiality of the reasoning below. In the period under review no perceptible "invasion" of Hanover's rights occurred. Dealings between the parties on a lease basis proceeded without a murmur of protest. Machines were returned, repair services utilized, replacements made in the regular flow of business. These have no bearing on refusal to sell, the assumed violation. They could not in any event amount to more than the re-assertion of refusal to sell which the Court of Appeals acknowledged insufficient to accrue a new cause of action (377 F. 2d at 794, A. 220).[12]

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[12]A summary judgment for the defendants in the *Peto* case, cited in our main br. 71, n. 22, has been affirmed *per curiam* in 384 F. 2d 682 (CA 2 1967), petition for cert. filed, No. 1121, Oct. Term 1967, 36 U. S. L. Week 3323 (Feb. 15 1968).

## CONCLUSION

Hanover repeats in its Conclusion the improper requests for relief to which we replied at pp. 26-29 of our brief in No. 335, and only the novel assertion by Hanover (br. 7) that its "theory of damages [was] accepted by both courts below" requires further answer.

United raised serious issues as to the validity of Hanover's damage calculations which the Court of Appeals found not "possible to adjudicate . . . on the present record" in view of the retrial which that court directed on damages, 377 F. 2d at 791, A. 212. United challenged, for example, Hanover's amazing assumption that it could have disposed of its used machines for a salvage value ($1,226,801, A. 668) equal to almost two-thirds of the *total net cost of leasing* as computed by Hanover ($1,863,680, A. 664). Again, United pointed out that Hanover's damage calculations included numerous machines which it leased solely because they could easily be returned if they became unnecessary or obsolete, and which it would not have purchased (see A. 323). As these and other substantial issues raised by Hanover's damage calculations have not been considered by the Court of Appeals, Hanover cannot properly assert that its calculations have been accepted by both courts below.

As stated in our main brief, pp. 71-72, this action should be dismissed or, on the certification and cost of capital points, remanded to the Court of Appeals for the guidance of the District Court.

Respectfully submitted,

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February 27 1968

## APPENDIX A

[Last page of Def. Ex. 35, admitted R. 392, containing discount table on purchase of used machinery outstanding on Form A Leases. Referred to at p. 18 of foregoing brief.]

### METHOD OF COMPUTING PURCHASE PRICES OF SHOE MACHINES OUTSTANDING ON FORM A LEASE OR REQUEST FOR LOAN OF MACHINES ON DECEMBER 31, 1954

The purchase price is determined by multiplying the sale price of the machine, less initial payment if any, by the percentage factor applicable to the age of the machine.

The machine age will be figured from the original shipping date.

The sale prices and initial payments are those set forth in the schedule of shoe machinery lease terms and sale prices effective January 1, 1955, referred to in our letter of November 27, 1954.

| *Machine Age (Years)* | *Percentage Factor* | *Machine Age (Years)* | *Percentage Factor* |
|---|---|---|---|
| Less than 1 | *(See below) | | |
| 1 but less than 2 | 82.4% | 17 but less than 18 | 31.4% |
| 2 " " " 3 | 78.1 | 18 " " " 19 | 29.6 |
| 3 " " " 4 | 73.8 | 19 " " " 20 | 27.8 |
| 4 " " " 5 | 69.7 | 20 " " " 21 | 26.2 |
| 5 " " " 6 | 65.7 | 21 " " " 22 | 24.8 |
| 6 " " " 7 | 62.0 | 22 " " " 23 | 23.3 |
| 7 " " " 8 | 58.5 | 23 " " " 24 | 22.0 |
| 8 " " " 9 | 55.1 | 24 " " " 25 | 20.7 |
| 9 " " " 10 | 51.9 | 25 " " " 26 | 19.8 |
| 10 " " " 11 | 48.8 | 26 " " " 27 | 18.8 |
| 11 " " " 12 | 45.9 | 27 " " " 28 | 17.9 |
| 12 " " " 13 | 43.0 | 28 " " " 29 | 17.2 |
| 13 " " " 14 | 40.4 | 29 " " " 30 | 16.6 |
| 14 " " " 15 | 38.1 | 30 " " " 31 | 16.0 |
| 15 " " " 16 | 35.8 | 31 " " " 32 | 15.5 |
| 16 " " " 17 | 33.4 | 32 and older | 15.0 |

*Subsequent to May 17, 1955 there will be no machine less than 1 year old outstanding on Form A lease. Purchase price for machines that are less than 1 year old held on Request For Loan of Machines executed on or after May 17, 1954 is the full sale price of the machine less any initial payment already paid.

## APPENDIX B

[Testimony of Charles H. Jones, Jr. December 3 1962, referred to at p. 21 of foregoing brief.]

Q. Did you participate in discussions which the Committee had with United Shoe Machinery Corporation in 1950? A. Yes, I did.

Q. Were you then chairman of the Committee? A. That is right, I was.

Q. I show you a document which has been marked in this case as Plaintiff's Exhibit 24 in evidence, Mr. Jones, which is a memorandum to the Technical Committee from W. W. Stephenson, dated August 29, 1950, and it has a six-page memorandum with your name typed thereon at the end attached to the communication.

Have you ever seen that before? A. Yes, I have.

Q. Did you see it about the date that it bears? A. Did I see it about that time?

Q. Yes. A. Yes.

Q. In the attached document, at pages 4 and 5, do you note six numbered paragraphs which the document states the Committee will take up with United Shoe Machinery Corporation? A. Yes.

Q. Do you see that the second paragraph deals with—if I may look at it again, to paraphrase it more accurately—deals with a consultation that will be held with United and industry representatives with a view to selecting certain machines now offered on a lease basis only and establishing such machines on a basis of optional lease or outright purchase?

Do you recollect that point having been discussed in the Technical Committee? A. Yes.

Q. By the way, I see on the first page the name of Mr. L. B. Sheppard. He was a member of the Committee, was he? A. That is right.

*Appendix B*

Q. You knew Mr. Sheppard? A. Yes.

Q. How long have you known Mr. Sheppard? A. Well, at least since the late 40's, and probably before that.

Q. Now, my question is, with respect to this paragraph 2, whether a list of additional optional term machines previously offered on a lease basis only was ever agreed upon by the committee for submission to United Shoe Machinery Corporation? A. I do not recall that there was ever such an agreed list.

Q. Was the selection of such a list a subject of discussion on the committee of which you were a member? A. Yes, certainly it was, and at the time that the submission was made, and prior to that, and since that.

Q. When you say submission was made, what order are you referring to? A. I referred to this document, the submission of the six points there.

Q. To United Shoe, you mean? A. To United Shoe.

Q. Now, I would like you to tell the Court, if you would, what the discussion was on the technical committee at said time so far as concerns the reasons for the failure to select a list of machines for purchase? A. Well, this was a developing program——

Mr. Hayes: May we have the time and place of this conversation fixed, please?

Q. Yes, can you at Mr. Hayes' request tell us where the discussions on this subject occurred and when they occurred? A. They occurred during the year '50 and at various places such as New York City, such as Boston, and such as Chicago, these during a meeting of the committee, and during meetings—or a meeting of the industry group in Chicago.

*Appendix B*

Q. Now, confining ourselves to the committee, will you tell us what the discussions were so far as concerned the selection of a list of lease only machines which United Shoe was to be requested to sell? A. Well, this was a developing program and at the time the program was discussed it was suggested that the number of machines available for purchase was small and that such a list of machines could be enlarged with advantage to the industry and in order to start the program going it was—this recommendation was given that the machines offered on a lease basis, a lease basis or purchase basis be increased, and the discussion at that time was not specific as to just what machines for reasons that the committee nor others in the industry represented by the committee had made a judgment as to what machines they would want on this optional basis or purchase.

Q. Well, now, were there different views expressed in the committee as to whether or not additional machines should be put on sale? A. There was discussion of whether additional machines should be offered for sale and there was agreement that additional machines offered for sale would be desirable, but there was not specific discussion of just what machines. The discussion was more toward the basic progress of getting more optional lease and purchase machines for the reason that different companies in the industry might have different views as to just what was wanted.

Q. Now, just tell us what was said on that subject on behalf of different companies as to what was wanted. A. This would tax a memory greater than I can supply to pick out the specific companies. In a general way the feeling was that the industry would like to have more machines,

there were some companies in the industry whose capital might be limited, that had less interest in getting machines for purchase than others who had greater capital resource, smaller companies, for example, might say we're satisfied with the present arrangement in a general way as far as purchasing or leasing machines are concerned, where larger companies might or possibly did want to have the opportunity of buying machines and thereby gaining something in use of the machine at a fixed cost rather than at a per pair cost.

Q. Are you now telling us what was said in the committee discussions? A. This was the type of discussion.

Q. Can you identify either from the list on the first page of Exhibit P-24 or from memory which members of the committee expressed the views that you spoke of as the views of the larger companies and which expressed the views that you spoke of as the views of the smaller companies? A. Well, on this list there are a number representing small to medium-sized companies such as myself—in reading down the list, Mr. Cadwell of Freeman Shoe, a medium company, not one of the largest, Mr. Reardon of Daniel Green Shoe, a smaller company, not one of the largest, Mr. Sheppard, who is here in this case, Mr. Slossberg, representing a medium to smaller company, and Mr. Wier Stewart, representing probably the smallest of the group.

My recollection is of Mr. Stephenson at that time commenting about the importance of the technical committee's representing the industry as a whole and the importance of the technical committee's recommendations being such that the industry as a whole would support the recommendations of the technical committee rather than for the technical committee as such to have its own views so that I believe that

Mr. Stephenson is the individual or was the individual who suggested that the recommendations of the technical committee should be so thoughtfully made that they would have the approval of the industry as a whole, including the smaller manufacturers about whom he commented there would be a question of the desirability of how many machines or how broad they would wish to have the choice of lease or purchase at the option of the individual company.

Q. Was ever any recommendation made by the committee as to a specific list of machines that they would request be put on optional purchase or sale basis? A. I do not believe there was such a lease [*sic*: list] made.

Q. Did the committee ever get to a discussion—this may be a superfluous question, but we will ask it—a discussion of specific prices to be requested of United Shoe with respect to any machine type? A. No, only to indicate that we thought the prices were high.

Q. I mean you are referring now to the lease terms? A. Well, either one.

Q. How about the sale prices for lease only machines, if they are to be put on optional sale; was there any price figure ever agreed upon by the committee as to any machine type that they would request not [*sic*: now] be put on sale? A. There were no prices that I could recall suggested to United but after United had set prices, of course they always looked higher than we hoped they might.

Q. You are referring to the 1955 prices? A. Right.

SUPREME COURT, U. S.

JUL 11 1968

JOHN F. DAVIS, CLERK

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1967

Nos. 335 and 463

THE HANOVER SHOE, INC.,
*Petitioner,*
*v.*
UNITED SHOE MACHINERY CORPORATION

UNITED SHOE MACHINERY CORPORATION,
*Petitioner,*
*v.*
THE HANOVER SHOE, INC.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

## PETITION FOR REHEARING OF UNITED SHOE MACHINERY CORPORATION (RESPONDENT IN NO. 335, PETITIONER IN NO. 463)

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July 9 1968

## TABLE OF CONTENTS


PAGE

1. Expansion by the majority opinion of Clayton Act § 5(a) beyond the underlying antitrust decree, through resort to the findings for material not contained in the decree, violates the Congressional purpose with respect to the estoppel thereby created. ..... 2

2. The majority decision erroneously deprives petitioner of the settled law of this Court which approved its lease-only policy until by this Court's affirmance (347 US 521) of the 1953 decree the rule was changed. ..... 6

3. The majority opinion rests on the erroneous assumption that petitioner's lease charges were illegally high, contrary to the findings below. ... 11

4. Grave injustice is done to petitioner by reversing the Court of Appeals' determination that the tax benefits of the leasing system are essential to just and fair comparison of leasing cost with purchase cost. ..... 12

5. The findings below as to likelihood of purchase by Hanover in the damage period are too speculative in the absence of explicit demand, to support a judgment penal in character for failure to sell. ... 15

Conclusion ..... 17

Certificate under Rule 58 ..... 18

## TABLE OF CASES

PAGE

*Continental Ore Co.* v. *Union Carbide & Carbon Corp.* 289 F. 2d 86, rev'd 370 US 690 ..... 16

*Emich Motors Corp.* v. *General Motors Corp.* 340 US 558 ..... 3-4

*International Shoe Mach. Corp.* v. *United Shoe Mach. Corp.* 315 F. 2d 449, cert. den. 375 US 820 ..... 11

*Keogh* v. *Chicago & N. W. Ry.* 260 US 156 ..... 11

*Muskin Shoe Co.* v. *United Shoe Mach. Corp.* 167 F. Supp. 106, dismissed by order dated January 4 1963 11

*Perma Life Mufflers Inc.* v. *International Parts Corp.*, October Term 1967 No. 733 ..... 16

*Thomsen* v. *Cayser* 243 US 66 ..... 11

*United States Gypsum Co.* v. *National Gypsum Co.* 352 US 457 ..... 5

*United States* v. *Aluminum Co. of America* 148 F. 2d 416 ..... 7

*United States* v. *International Harvester Co.* 274 US 693 ..... 10

*United States* v. *United Shoe Mach. Co.* 222 Fed. 349, aff'd 247 US 32 ..... 7-8, 10

*United States* v. *United Shoe Mach. Co.* 234 Fed. 127, 264 Fed. 138, aff'd in part 258 US 451 ..... 9

*United States* v. *United Shoe Mach. Corp.* 110 F. Supp. 295, aff'd *per curiam* 347 US 521 ..... 1-2, 4, 6-7, 10-11

*United States* v. *United States Steel Corp.* 251 US 417 10

*Vicksburg* v. *Henson* 231 US 259 ..... 9

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1967

| | |
|---|---|
| THE HANOVER SHOE, INC., *Petitioner,* *v.* UNITED SHOE MACHINERY CORPORATION | Nos. 335 and 463 |
| UNITED SHOE MACHINERY CORPORATION, *Petitioner,* *v.* THE HANOVER SHOE, INC. | |

## PETITION FOR REHEARING OF UNITED SHOE MACHINERY CORPORATION (RESPONDENT IN NO. 335, PETITIONER IN NO. 463)

Rehearing is hereby sought pursuant to Rule 58 of the Court's decision rendered June 17 1968 following certiorari on cross-petitions granted in 389 US 81. This petition seeks further consideration by the Court of important questions of antitrust law raised in a treble damage suit by a lessee of shoe machinery against United Shoe Machinery Corporation on the basis of the decree in 110 F. Supp. 295, aff'd 347 US 521. The Court's decision, Stewart J. dissenting and Marshall J. not participating, proceeds on the basis of what are believed to be fundamental misapprehensions of fact and law which have resulted in grave injustice.

Without waiver of contentions heretofore made, petitioner respectfully directs the Court's attention to the following as principal grounds for rehearing.

**1. Expansion by the majority opinion of Clayton Act § 5(a) beyond the underlying antitrust decree, through resort to the findings for material not contained in the decree, violates the Congressional purpose with respect to the estoppel thereby created.**

Fundamental to this Court's affirmance of the judgment below is the construction given to the 1953 decree of Wyzanski J., 110 F. Supp. 295. Unless that judgment evidenced the illegality of the lease-only practice, then the majority opinion recognizes (p. 2),

> ". . . Hanover, having offered no other convincing evidence of illegality, should not have recovered at all."

Hanover prevailed below upon a broad construction of the decree in the prior Government case as extending to the lease-only practice even though the decree does not mention such practice, either generally or as an antitrust violation. The majority in this Court (Stewart J. dissenting) has approved such broad construction with the statement that the Court is not "limited to the decree in determining the extent of estoppel resulting from the judgment in the Government's case" (p. 3). This conclusion, which is indispensable to recovery by Hanover, is submitted to be grave error violative of the intent of Congress.

Clayton Act § 5 is the sole authority for Hanover's attempted estoppel by judgment. The statutory language is explicit in confining such estoppel to

> "A final *judgment or decree* . . . rendered . . . in any civil or criminal proceeding brought by or on behalf of the United States under the antitrust laws *to the effect that a defendant has violated said laws* . . ." (Emphasis supplied)

Hence in measuring the statutory estoppel the Court is confined to the actual language of the "judgment or decree". Where that judgment is entered without particularization upon a general verdict in a criminal case and where the ensuing treble damage action itself is before a jury, then necessarily the meaning and extent of the judgment of conviction are to be explained by the treble damage court to the treble damage jury. This is one of the incidents of jury trial necessarily taken into account by Congress in Clayton Act § 5. As stated by this Court in *Emich Motors Corp.* v. *General Motors Corp.* 340 US 558 at 571,

> "What issues were decided by the former Government litigation is, of course, a question of law as to which the court must instruct the jury. It is the task of the trial judge to make clear to the jury the issues that were determined against the defendant in the prior suit, and *to limit to those issues the effect of that judgment as evidence in the present action.*" (Emphasis supplied)

The majority opinion cites *Emich* without making the essential distinction between the requirements of the double jury trial there involved, and the unique exactitude of a decree in equity. The Congressional expression "final judgment or decree" is a term of art, the judgment being the medium through which the court speaks with final authority. With respect to a proceeding in equity Congress could not have intended by employing the term to authorize excursions outside the judgment or decree so as to amplify or extend its sweep in the estoppel on which a subsequent damage action would be erected. For it is clear from the language of § 5 that the statutory force is limited, not only to the judgment or decree of the equity court, but to that portion which adjudicates "that a defendant has violated said [antitrust] laws".

Both parts of the Congressional expression, it is submitted, restrict the treble damage court both to the decree pure and simple, without circumscribing explanatory matter such as findings; and to the effect of the decree in determining a violation by the defendant of the antitrust laws. Both parts of this Congressional purpose are satisfied by the exemplary precision with which the antitrust court, Wyzanski D. J. in 110 F. Supp. 295, pin-pointed in his judgment the violations that he found, setting off to one side the explanatory findings which constitute no part of the "final judgment or decree" that Congress established as the only base of the statutory estoppel. For instance, the language of the majority opinion as to the reasoning of the antitrust court in respect of the lease-only policy, however plausible it might seem, only emphasizes the distinction between decree and findings. The majority argue from certain language of Wyzanski J. about the necessity of alternative sales in the future, that the lease-only policy must, in the mind of the antitrust court, "also have made a substantial contribution to United's monopolization of the market during the period prior to the entry of the judgment" (p. 4 fn. 3). But controlling significance surely should be attached to the fact that, whatever the author of the decree thought on this point, *he did not insert such a determination in the decree* which Congress made the only vehicle for Hanover's estoppel.

Both the majority and the minority opinions in this Court recognize that the instruments of monopolization are carefully defined in the antitrust decree par. 4 as certain lease terms and nothing else. But the majority opinion, misapplying (as we respectfully submit) the *Emich* rule applicable only to a criminal conviction, deliberately travels outside the permitted limits of the decree in order to add to the antitrust condemnation a determination as to United's

lease-only policy which the antitrust court did not put into its decree. We submit that the omission of that determination from the antitrust decree was deliberate, and that the injection thereof into the decree for the purpose of enlarging the estoppel was, on the part of this Court, the kind of legislative action which Congress alone is competent to make.

If excursions are to be made outside the antitrust decree for a determination of its purpose and effect, this record demonstrates the real intention of the antitrust court with respect to the lease-only point. As the dissenting opinion notes, Wyzanski J. made his own views clear to Government counsel upon United's application for a construction of his decree:

> "Now that you here, are you not aware from being here on previous occasions that the government never contended, and I never ruled, as Judge Sheridan supposes the matter was decided?" (opinion of Stewart J. p. 4 fn. 2; see R. 141-3)

If the Court were to go outside the decree proper for the intention and holding of the antitrust court, the application which United made before judgment in the treble damage court for that purpose should be granted and taken into account. This Court has approved the practice of construction of the underlying Government decree by the original antitrust court. *United States Gypsum Co.* v. *National Gypsum Co.* 352 US 457, 463-4. In that instance this Court said the issues presented in a private antitrust case were "issues peculiarly within the province of the antitrust court, whose determination would avoid . . . possibly conflicting decisions . . ." Again, if the Court is to travel outside the decree proper, controlling weight should in our

opinion be given to that portion of the findings in which the antitrust court said (110 F. Supp. at 323, 340):

> "Moreover the testimony in this case indicates virtually no shoe manufacturers who are dissatisfied with the present system.
>
> . . . . . .
>
> In supplying its complicated machines to shoe manufacturers, United, like its more important American competitors, has followed the practice of never selling, but only leasing. . . . So far as this record indicates, there is virtually no expressed dissatisfaction from consumers respecting that system; and Compo, United's principal competitor, endorses and uses it."

This language in the findings is a further demonstration that the antitrust court did not intend by its decree to adjudicate the lease-only policy as an antitrust violation so as to create the estoppel which Hanover requires for recovery. From the very reasoning which the majority adduces in dredging out of the 1953 findings a determination concerning lease-only which is not found in the decree, it would seem perfectly clear that this point was not "necessarily decided" or "distinctly determined" in the Government suit as the authorities require.

**2. The majority decision erroneously deprives petitioner of the settled law of this Court which approved its lease-only policy until by this Court's affirmance (347 US 521) of the 1953 decree the rule was changed.**

As pointed out in the opinion, pp. 17-18, three prior decisions in this Court dealt with United's leasing practices in one way or another. Basic to the proper determination of Hanover's claim to have been injured in the 1939-55 period by United's lease-only practice, is the 1918 decision

of this Court sustaining the validity of that practice. *United States* v. *United Shoe Machinery Co. of New Jersey* 247 US 32. Wyzanski J. in entering a decree of monopolization thought that this and other cases had approved United's procedure, 110 F. Supp. at 341, 343, although he saw in the *Aluminum* case a "reversal of trend" which led him in 1953 to find United monopolizing in violation of § 2 and, for the future beginning in 1955, to eliminate by decree the lease-only practice.

The majority opinion recognizes that the Court had affirmed dismissal of a bill which charged that the machinery leases and license agreements violated §§ 1 and 2 of the Sherman Act (p. 18). The majority also seems to recognize the full sweep of the holding.[1] Yet for some reason the majority fails to give the 1918 decision its full and legitimate effect. We respectfully submit that this conclusion is clearly erroneous on two grounds.

One part of the decision on this point seems to be that the 1918 case did not adjudicate the lease-only practice.

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[1] "There is no question but that the leases as they were then constituted were held unassailable under § 1; the reasons for this ruling are not clear. As for the § 2 charge, we cannot read the opinion as specifying what course of conduct would amount to monopolization under § 2 if engaged in by a concern with monopoly power. At most the holding was that the leases themselves did not prove a § 2 charge—did not themselves prove monopoly power as well as monopolization. But the issue in the case before us now is not whether United's leasing system proves monopoly power but whether, once monopoly power is shown, leasing the way United leased sufficiently shows an intent to exercise that power. There is little, if anything, in the 1918 opinion which is illuminating on this issue. Indeed, it may fairly be read as holding that United did not have monopoly power over the market at all, for in rejecting the claim that United's practice of leasing was illegal when used by a corporation dominant in the market, the Court said:

> 'This, however, is assertion and relies for its foundation upon the assumption of an illegal dominance by the United Company that has been found not to exist. This element, therefore, must be put to one side and the leases regarded in and of themselves and by the incentives that induced their execution . . .' 247 U.S., at 60."

The Court says, after paraphrasing the decision as to both § 1 and § 2,

> "But the issue in the case before us now is not whether United's leasing system proves monopoly power but whether, once monopoly power is shown, leasing the way United leased sufficiently shows an intent to exercise that power."

This seems to imply that the 1918 case did not deal with "leasing the way United leased", i.e. with the exclusive leasing system. But the fact is obviously to the contrary. The leases before the Court in 1918 were part of a lease-only system, as clearly pointed out by the District Court in that case (222 Fed. at 352):

> "On the whole, as the case developed, no objection was persisted in by the United States to the fact that the policy of the Shoe Machinery Company was to lease its machines, instead of selling them. It was plain that this policy was not injurious in a large sense."

This means that the Supreme Court had in view a lease-only system when it held "The evidence disproves" the contention that the leases "preclude the competition of the second [machinery makers] with the defendants" (247 US at 63).

Again it is evident that this Court in the 1918 case understood the lease-only system to be under attack when it quoted the Government's charge that

> "it is, however, in their combined effect as a system of leasing, used and insisted upon by a corporation dominant in its field that the full extent of their illegality is to be perceived." 247 US at 60

The second ground suggested by the Court for rejecting the 1918 decision as a justificatory precedent is that the

subsequent Clayton Act case, 258 US 451 (1922), limited the 1918 holding. The Court refers (p. 19) to the fact that at p. 460 of 258 US the leases attacked in the 1918 case "were sustained as valid and binding agreements within the rights of holders of patents". This language however was employed in the 1922 case, not to limit the former holding, but to show that the cause of action in the two cases was "not the same". The 1922 decision points out that the Clayton Act dealt with machinery, whether patented or unpatented, and that the restrictive clauses held valid under the Sherman Act in 1918 could not survive the different tests of the Clayton Act (258 US at 460-2).

Hence the language in the majority opinion from 258 US at 460 could not have been intended to subtract from the full force of the prior holding that the lease-only policy complied with the Sherman Act as that Act was construed by this Court in 1918 and (as regards United's leases) up to 1954. If the phrase "authoritative gloss" (opinion p. 20) with respect to the 1922 opinion is intended to imply that it somehow overruled the 1918 opinion as regards the lease-only policy, it is respectfully submitted that the holding is error which justifies rehearing in view of its critical importance with respect to the issue here.

The Court in the 1922 case, 258 US at 460, properly pointed out that isolated passages in the 1918 opinion could not be seized upon to determine "the effect of the former judgment as an estoppel". It cited *Vicksburg* v. *Henson* 231 US 259, 269, where it was said:

> "It is well settled, however, that a decree is to be construed with reference to the issues it was meant to decide. [Citations]"

Construed with reference to the issues it was meant to decide, the 1918 decision of this Court validated with a fullness which we submit is not fairly open to dispute

the lease-only practice which this Court now holds (opinion pp. 3-5 and appendix) the 1953 decree condemned. For the decree affirmed by this Court in 1918 dismissed the bill, as the Court recognizes (opinion p. 18). The bill dismissed contained a full description of the leasing system as the sole method of distribution to the exclusion of sales (222 Fed. at 351-3). The opinions of the three-judge court are a complete vindication under the Sherman Act as construed by them of the lease-only system. See Putnam J. at p. 361 of 222 Fed.; Dodge J. at pp. 370-1 and 391; Brown J. at pp. 401 and 414-5. These judges clearly understood the issue to be exactly the same issue as was here given a different determination in 1953-4. Thus Brown J. said, 222 Fed. at 408:

> "It is most important to observe that the petition presented the lease system as a part merely of a general plan of monopoly. The main brief of the United States so treated it."

Hence the affirmance by this Court in 1918 of the conclusion so clearly reached by the three-judge court as to the validity of the leases and the lease-only system under the Sherman Act, was a valid and binding determination of the propriety of United's leasing system until the new version was adopted by Wyzanski J. in 1953 with the subsequent sanction of this Court.[2]

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[2]Illustrating how fully the 1918 Court went into practices later condemned is the approval in 1915 of the full-capacity clause (222 Fed. at 388, 404) that Wyzanski J. criticized in 1953 (110 F. Supp. at 340). We are surprised to find the explicit holdings of the Court in the *Steel* case and the *International Harvester* case with respect to the necessity of overt and predatory practices as an element of monopolization, now characterized by this Court as "dicta" (opinion p. 16 fn. 13). As we read the language both of McKenna J. in 251 US at 451 and of Sanford J. in 274 US at 708, it was in each instance essential to the outcome of the case and hence could not be properly discarded as dictum.

We of course do not contest this Court's *power* to overrule in 1954 the 1918 decision by affirming in 347 US 521 the 1953 decree (110 F. Supp. 295). What we do contest, and what we respectfully suggest the rule of law does not permit, is the conversion of such overruling decision into a retroactive violation by defendant of the Sherman Act in the prior period 1918-54 in which defendant justly considered that it was complying with that Act. Such a result transcends the individual case and discourages law observance.

**3. The majority opinion rests on the erroneous assumption that petitioner's lease charges were illegally high, contrary to the findings below.**

The District Court found that the lease charges were reasonable in amount (R. 100, 57). Sheridan J. said that Hanover's claim with respect to purchase

> "... does not necessarily imply excessive returns to United." (R. 55)

The Court of Appeals did not disturb this finding.[3]

The majority opinion here seems to proceed under the misapprehension that the lease charges in themselves were illegally high. Thus it refers to the assumption that Hanover "paid illegally high prices for machinery leased from United" (p. 6 fn. 6), to "the excessive rentals" (*ibid.*), to the price paid by a hypothetical buyer as being "illegally high" (p. 7), to the language of the Court in *Thomsen* v. *Cayser* about "more than a reasonable rate" (p. 8 fn. 7), to the result which would have been reached in the *Keogh* case

[3]Cf. the unanimous determinations in the lower Federal courts concerning the legality of United's leases. Wyzanski J. in 110 F. Supp. at 344, 349; Thomsen C. J. in *Muskin Shoe Co.* v. *United Shoe Machinery Corp.* 167 F. Supp. 106, 111 (D. Md. 1958); Hartigan Cir. J. in *International Shoe Machine Corp.* v. *United Shoe Machinery Corp.* 315 F.2d 449, 458 (CA 1 1963), cert. den. 375 US 820.

if the rate had been "unreasonably high" (p. 9 fn. 8), and to the alternative situation where plaintiff can "prove that he has been charged an illegally high price" (p. 10 fn. 8 continued).

This language suggests that the basic reasoning of the Court proceeded on misconceptions of fact and law. There was nothing "illegal" about the lease charges which Hanover paid with entire willingness (so far as appears), without protest, and with great financial advantage in the whole of the damage period 1939-55. Nor was there anything "illegally high" about them. The mere fact that a putative purchase price *could be figured out* at a later date which would be less than the aggregate of the lease payments over the 16 years 1939-55, does not suggest either illegality or excessiveness in the lease charges themselves. Five dollars paid today cannot fairly be compared with six dollars paid over five years as an indication of a one dollar overcharge.

Since conceptions of illegality and excessiveness in the charges paid by Hanover permeate the majority opinion and deflect its reasoning, we request that rehearing be granted to correct the resultant error.

**4. Grave injustice is done to petitioner by reversing the Court of Appeals' determination that the tax benefits of the leasing system are essential to just and fair comparison of leasing cost with purchase cost.**

The evidence below showed that the availability of Hanover's annual lease payments as current business expenses for income tax purposes was a financial advantage which reduced the cost of leasing as compared with purchase. Hanover's expert R. M. Cyert, said on direct examination that he endorsed

> ". . . the notion of introducing taxes on making a decision on preparing data for management to make

> a decision as to whether they should purchase or not." (R. 547)

Hence the Court of Appeals was correct in reversing the District Court on this point:

> "What is involved here is not the tax on Hanover's recovery but rather the tax elements which would bear on Hanover's choice of purchasing rather than leasing the machinery it required." (R. 214, 377 F.2d at 792)

To ignore the entry of taxes into the contemporary year-by-year business calculation would be, the Court of Appeals thought, "a distortion of reality" (R. 215). Even more, to eliminate this element in the comparison of lease cost vs. purchase cost so as to create the appearance of "damage" contrary to fact, would be flagrantly wrong. It would be to fasten on defendant a court-created "injury" and "damage".

The majority opinion seems, with great respect, to exhibit misunderstanding of what the Court of Appeals did. It says (p. 21):

> "The Court of Appeals *evidently felt* that since only after-tax profits can be reinvested or distributed to shareholders, Hanover was damaged only to the extent of the after-tax profits that it failed to receive." (Emphasis supplied)

This would appear to be a wholly mistaken reading of the Court of Appeals' decision. Nothing in that decision justifies the analysis of its reasoning as directed to *after-tax profits* or their investment or distribution. We are not concerned with what it "evidently felt". There is nothing in the Court of Appeals' opinion which talks about the extent of the after-tax profits that Hanover failed to

receive. On the contrary the theory and language of that court are perfectly clear. It points out the injustice of striking from the purchase vs. leasing equation the substantial element of tax benefit which is essential to the equation and which (as everyone knows) motivates the current decisions of Hanover and other businessmen.[4]

The majority opinion acknowledges that

> "The view of the Court of Appeals is sound in theory . . ." (p. 21).

But the necessary effect of this sound theory in diminishing the damages claimed by Hanover is side-tracked by the Court's discussion of how the Internal Revenue Service treats recovery for tortious deprivation of profits. This is not at all the question before the Court. The question was not how to tax tortious deprivation of profits, but *whether there was any deprivation at all,* tortious or not. In order to reach that question and determine it correctly it was indispensable to take into account the annual tax advantage to Hanover of the leasing system which it would not have enjoyed if it had bought the machines.

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[4]Without quoting in full the whole of the two paragraphs of the Court of Appeals on this point at R. 214-5, we call attention to such language as: "A business of any size necessarily must give consideration to the tax elements inherent in the two alternatives . . ."; in determining whether Hanover would have purchased it is "significant . . . to evaluate the respective tax consequences of purchase and of lease"; ". . . these tax consequences are so inherently a part of the choice which would be made . . ."; and the question is not one of subsequent tax effect on damages inflicted but rather "the choice of one over another course of action in both of which the tax impact necessarily was a matter of contemporaneous consideration and significance".

**5. The findings below as to likelihood of purchase by Hanover in the damage period are too speculative in the absence of explicit demand, to support a judgment penal in character for failure to sell.**

The Court says that both courts below "found . . . that Hanover, had it been given the opportunity, would have bought rather than leased the machines offered by United", and says that this finding "is supported by the evidence" (p. 22 fn. 16).

We submit that the Court has here misapprehended both the findings and the evidence. The only finding is a single statement of the District Court:

> "Hanover need not show that in any and all cases it would have purchased, but that it *likely* would have purchased the machines." (R. 66; emphasis supplied)

The weightiest aspects of the evidence as summarized by the District Court at R. 66-8 negative any probability of purchase in the pre-1955 period. These are the voluntary lease by Hanover of 136 United optional terms machines for which Hanover voluntarily paid a total of $64,700 rental (R. 67-8); the flat declaration of Hanover's President that he had no objection to the leasing system (R. 335, 341); and Hanover's policy not to buy machines which were obsolescent (R. 311, 320, 332-3).

The speculative nature of the ultimate finding "likely would have purchased", turning Hanover's after-thought into a windfall, points up the necessity of an explicit prior demand in order to prevent injustice. Admittedly no demand was made in this case (R. 66). United was left in the belief that Hanover was satisfied, like the hundreds of other customers, with its position as lessee. Indeed Han-

over's President so stated (R. 335, 341). Hanover counsel said in oral argument at the bar of this Court:

> "We are not suing on the basis of a refusal to sell which is the way you have to get back to 1912."

Hence we submit it was error, leading to a grave miscarriage of justice, to permit recovery herein without prior demand, explicit and unmistakable, which would not only express the supposed purchase policy but also identify the particular machines as to which Hanover would assume the burden and risk of ownership. This requirement, so obvious in the interest of simple fairness, Hanover has been permitted to avoid through the fiction of transferring its United machines from a lease to a purchase basis. Yet the entire body of decisional law has required express demand as a condition for recovery of treble damages.[5]

While the majority opinion refers, as authority for dispensing with explicit demand "in the circumstances of this case", to *Continental Ore Co.* v. *Union Carbide & Carbon Co.* 370 US 690, 699, surely a material difference between the cases is that in *Continental Ore* this Court pointed out that plaintiffs had made "repeated approaches" in the effort to buy from defendants (370 US at 700). By contrast with the case at bar where admittedly no demand existed, plaintiffs in that case claimed to have made many demands.[6]

The vital importance of prior demand in this kind of case is again instanced by the Court's emphasis in *Perma Life Mufflers Inc.* v. *International Parts Corp.*, October Term 1967 No. 733, where Black J. noted (p. 3):

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[5]Our brief dated November 22 1967 in No. 463 at p. 57 cites the nine cases in the Courts of Appeal of seven circuits.

[6]See petitioners' opening brief pp. 59, 101-5.

> "Petitioners alleged that they had often requested Midas to eliminate these restrictions but that Midas had refused . . ."

The absence in the present case of this vital prerequisite to the imposition of the penal sanction of treble damages should again, we submit, move this Court to grant the rehearing requested.

## Conclusion

The foregoing short submission demonstrates, we urge, the propriety and necessity of a rehearing to correct grave injustice. The wrong inflicted by the judgment below extends beyond the particular case, because here we have United's compliance with the antitrust law as authoritatively adjudicated in its situation punished by a treble damage clause reserved by Congress for a clear violation. So anomalous a result brings into question the whole scheme of the antitrust law.

Respectfully submitted,

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July 9 1968

## CERTIFICATE UNDER RULE 58

It is certified by the undersigned counsel, a member of the bar of this Court who briefed and argued the cause in Nos. 335 and 463, that the foregoing petition for rehearing of the determination therein is presented in good faith and not for delay.

RALPH M. CARSON

July 9 1968

# SUPREME COURT OF THE UNITED STATES

Nos. 335 AND 463.—OCTOBER TERM, 1967.

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| The Hanover Shoe, Inc., Petitioner,<br>335 *v.*<br>United Shoe Machinery Corp.<br><br>United Shoe Machinery Corp., Petitioner,<br>463 *v.*<br>The Hanover Shoe, Inc. | On Writs of Certiorari to the United States Court of Appeals for the Third Circuit. |

[June 17, 1968.]

MR. JUSTICE WHITE delivered the opinion of the Court.

The Hanover Shoe, Inc. (hereafter Hanover) is a manufacturer of shoes and a customer of United Shoe Machinery Corporation (hereafter United), a manufacturer and distributor of shoe machinery. In 1954 this Court affirmed the judgment of the District Court for the District of Massachusetts, 110 F. Supp. 295 (1953), in favor of the United States in a civil action against United under § 4 of the Sherman Act. *United Shoe Machinery Corp.* v. *United States*, 347 U. S. 521. In 1955, Hanover brought the present treble damage action against United in the District Court for the Middle District of Pennsylvania. In 1965 the District Court rendered judgment for Hanover and awarded trebled damages, including interest, of $4,239,609, as well as $650,000 in counsel fees. 245 F. Supp. 258. On appeal, the Court of Appeals for the Third Circuit affirmed the finding of liability but disagreed with the District Court on certain questions relating to the damage award. 377 F. 2d 776 (1967). Both Hanover and United sought review of the Court of Appeals' decision, and we granted both petitions. 389 U. S. 818 (1967).

I.

Hanover's action against United alleged that United had monopolized the shoe machinery industry in violation of § 2 of the Sherman Act; that United's practice of leasing and refusing to sell its more complicated and important shoe machinery had been an instrument of the unlawful monopolization; and that therefore Hanover should recover from United the difference between what it paid United in shoe machine rentals and what it would have paid had United been willing during the relevant period to sell those machines.

Section 5 (a) of the Clayton Act, 38 Stat. 731, as amended, 69 Stat. 283, 15 U. S. C. § 16 (a), makes a final judgment or decree in any civil or criminal suit brought by the United States under the antitrust laws "prima facie evidence . . . as to all matters respecting which said judgment or decree would be an estoppel as between the parties thereto . . . ." Relying on this provision, Hanover submitted the findings, opinion, and decree rendered by Judge Wyzanski in the Government's case as evidence that United monopolized and that the practice of refusing to sell machines was an instrument of the monopolization. United does not contest that prima facie weight is to be given to the judgment in the Government's case. It does, however, contend that Judge Wyzanski's decision did not determine that the practice of leasing and refusing to sell was an instrument of monopolization. This claim, rejected by the courts below, is the threshold issue in No. 463. If the 1953 judgment is not prima facie evidence of the illegality of the practice from which Hanover's asserted injury arose, then Hanover, having offered no other convincing evidence of illegality, should not have recovered at all.[1]

[1] Following the District Court's rejection of United's construction of Judge Wyzanski's opinion and decree, United filed a motion

Both the District Court and the Court of Appeals concluded that the lease only policy had been held illegal in the Government's suit. We find no error in that determination. It is true that § 4 of the decree [2] on which United relies condemned only certain clauses in the standard lease and that nowhere in the decree was any other aspect of United's leasing system expressly described or characterized as illegal monopolization. It is also arguable that § 5 of the decree, which required that United thenceforward not "offer for lease any machine type, unless it also offers such type for sale," was included merely to insure an effective remedy to dissipate the accumulated consequences of United's monopolization. We are not, however, limited to the decree in determining the extent of estoppel resulting from the judgment in the Government's case. If by reference to the findings, opinion, and decree it is determined that an issue was actually adjudicated in an antitrust suit brought by the Government, the private plaintiff can treat the outcome of the Government's case as prima facie evidence on that issue. See *Emich Motors Corp.* v. *General Motors Corp.*, 340 U. S. 558, 566–569 (1951).

Section 5 of the decree would have been a justifiable remedy even if the practice it banned had not been instrumental in the monopolization of the market. But

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requesting that the District Court certify the question of construction to Judge Wyzanski. United contends that the District Court erred in denying this motion, but we need not pass upon the merits of United's novel request, for the District Court clearly acted within its proper discretion in denying as untimely certification to another court of a question upon which it had already ruled.

[2] "4. All leases made by defendant which include either a ten-year term, or a full capacity clause, or deferred payment charges, and all leases under which during the life of the leases defendant has rendered repair and other service without making them subject to separate, segregated charges, are declared to have been means whereby defendant monopolized the shoe machinery market." 110 F. Supp., at 352.

in our view the trial court's findings and opinion put on firm ground the proposition that the Government's case involved condemnation of the lease only system as such. In both its opinion with respect to violation and its opinion with respect to remedy, the court not only dealt with the objectionable clauses in the standard lease but also addressed itself to the consequences of only leasing machines and to the manner in which that practice related to the maintenance of United's monopoly power.[3] These portions of the court's opinion are well supported by its findings of fact, which also estop United

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[3] In its opinion on remedy, in answering United's objection to its conclusion that the decree should require United to offer machines for sale as well as for lease, the court plainly said that United "has used its leases to monopolize the shoe machinery market. And if leasing continues without an alternative sales system, United will still be able to monopolize that market." 110 F. Supp., at 350. Clearly, if after purging the leases of objectionable clauses United would still be monopolizing by leasing but not selling its machines, the lease only policy must also have made a substantial contribution to United's monopolization of the market during the period prior to the entry of the judgment. Moreover, in its opinion on violation, where the three principal sources of United's market power were identified, the court pointed to "the magnetic ties inherent in its system of leasing, and not selling, its more important machines" and to the "'partnership'" aspects of leasing but not selling those machines. 110 F. Supp., at 344. The leases assured "closer and more frequent contacts between United and its customers than would exist if United were a seller and its customers were buyers." *Id.*, at 343. A shoe manufacturer by leasing was "deterred more than if he owned that same United machine, or if he held it on a short lease carrying simple rental provisions and a reasonable charge for cancelation before the end of the term." *Id.*, at 340. The lease system had "aided United in maintaining a pricing system which discriminates between machine types," *id.*, at 344, discrimination which the court later said had evidenced "United's monopoly power, a buttress to it, and a cause of its perpetuation . . . ." *Id.*, at 349.

as against the Government and which therefore constitute prima facie evidence in this case. We have set out the relevant findings in an Appendix to this opinion. They are themselves sufficient to show that the lease only system played a significant role in United's monopolization of the shoe machinery market. Those findings were not limited to the particular provisions of United's leases. They dealt as well with United's policy of leasing but not selling its important machines, with the advantages of that practice to United, and with its impact on potential and actual competition. When the applicable standard for determining monopolization under § 2 is applied to these facts, it must be concluded that the District Court and the Court of Appeals did not err in holding that United's practice of leasing and refusing to sell its major machines was determined to be illegal monopolization in the Government's case.[4]

II.

The District Court found that Hanover would have bought rather than leased from United had it been given the opportunity to do so.[5] The District Court deter-

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[4] In its brief on appeal from the judgment and decree rendered in the Government's case, United recognized that "[t]he principal practices which the [District] Court stressed were that defendant offered important complicated machines only for lease and not for sale and that defendant serviced the leased machines without a separate charge." Brief for Appellant, at 6, *United Shoe Machinery Corp.* v. *United States,* 347 U. S. 521 (1954). United also said that "[e]vidently the Court below regarded the fact that United distributes its more important machines only by lease and not by sale as the basic objection to the system." *Id.*, at 170.

[5] The Court of Appeals affirmed this finding and we do not disturb it. See also n. 16, *infra.* We also agree with the courts below that in the circumstances of this case it was unnecessary

mined that if United had sold its important machines, the cost to Hanover would have been less than the rental paid for leasing these same machines. This difference in cost, trebled, is the judgment awarded to Hanover in the District Court. United claims, however, that Hanover suffered no legally cognizable injury, contending that the illegal overcharge during the damage period was reflected in the price charged for shoes sold by Hanover to its customers and that Hanover, if it had bought machines at lower prices, would have charged less and made no more profit than it made by leasing. At the very least, United urges, the District Court should have determined on the evidence offered whether these contentions were correct. The Court of Appeals, like the District Court, rejected this assertion of the so-called "passing on" defense, and we affirm that judgment.[6]

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for Hanover to prove an explicit demand during the damage period. See *Continental Ore Co.* v. *Union Carbide & Carbon Corp.*, 370 U. S. 690, 699 (1962).

[6] The chronology of events with respect to this issue in the lower courts was as follows: After the pretrial conference, a separate issue which was thought might determine the action was set for trial pursuant to Fed. Rules Civ. Proc. 42 (b). The general question was whether, assuming that Hanover had paid illegally high prices for machinery leased from United, Hanover had passed the cost on to its customers, and if so whether it had suffered legal injury for which it could recover under the antitrust laws. After evidence had been taken on the issue, Judge Goodrich, sitting by designation, ruled that when Hanover had been forced to pay excessive prices for machinery leased from United, it had suffered a legal injury: "This excessive price is the injury." 185 F. Supp. 826, 829 (D. C. M. D. Pa. 1960). He also rejected the argument "that the defendant is relieved of liability because the plaintiff passed on its loss to its customers." *Ibid.* In his view it was unnecessary to determine whether Hanover had passed on the illegal burden because Hanover's injury was complete when it paid the excessive rentals and because "'[t]he general tendency of the law, in regard to damages at least,

Section 4 of the Clayton Act, 38 Stat. 731, 15 U. S. C. § 15, provides that any person "who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor . . . and shall recover threefold the damages by him sustained . . . ." We think it sound to hold that when a buyer shows that the price paid by him for materials purchased for use in his business is illegally high and also shows the amount of the overcharge, he has made out a prima facie case of injury and damage within the meaning of § 4.

If in the face of the overcharge the buyer does nothing and absorbs the loss, he is entitled to treble damages. This much seems conceded. The reason is that he has paid more than he should and his property has been illegally diminished, for had the price paid been lower his profits would have been higher. It is also clear that if the buyer, responding to the illegal price, maintains his own price but takes steps to increase his volume or to decrease other costs, his right to damages is not destroyed. Though he may manage to maintain his profit level, he would have made more if his purchases from the defendant had cost him less. We hold that the buyer is equally entitled to damages if he raises the price for his own product. As long as the seller continues to charge the illegal price, he takes from the buyer more than the

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is not to go beyond the first step' " and to exonerate a defendant by reason of remote consequences. *Id.*, at 830 (quoting from *Southern Pacific Co.* v. *Darnell-Taenzer Lumber Co.*, 245 U. S. 531, 533 (1918)). The Court of Appeals heard an interlocutory appeal pursuant to 28 U. S. C. § 1292 (b) and affirmed. 281 F. 2d 481 (C. A. 3d Cir. 1960). Certiorari was denied. 364 U. S. 901 (1960). United preserved the issue and presented it again to the Court of Appeals in appealing the treble damage judgment entered after trial of the main case. The Court of Appeals adhered to the principles of its prior decision. United brought the question here.

law allows. At whatever price the buyer sells, the price he pays the seller remains illegally high, and his profits would be greater were his costs lower.

Fundamentally, this is the view stated by Mr. Justice Holmes in *Chattanooga Foundry & Pipe Works* v. *City of Atlanta*, 203 U. S. 390 (1906), where Atlanta sued the defendants for treble damages for antitrust violations in connection with the city's purchases of pipe for its waterworks system. The Court affirmed a judgment in favor of the city for an amount measured by the difference between the price paid and what the market or fair price would have been had the sellers not combined, the Court saying that the city "was injured in its property, at least, if not in its business of furnishing water, by being led to pay more than the worth of the pipe. A person whose property is diminished by a payment of money wrongfully induced is injured in his property." *Id.*, at 396. The same approach was evident in *Thomson* v. *Cayser*, 243 U. S. 66 (1917), another treble damage antitrust case.[7] With respect to overcharge cases arising under the transportation laws, similar views were expressed by Mr. Justice Holmes in *Southern Pacific Co.* v. *Darnell-Taenzer Lumber Co.*,

[7] "It is, however, contended that even if it be assumed the facts show an illegal combination, they do not show injury to the plaintiffs by reason thereof. The contention is untenable. Section 7 of the act gives a cause of action to any person injured in his person or property by reason of anything forbidden by the act and the right to recover three-fold the damages by him sustained. The plaintiffs alleged a charge over a reasonable rate and the amount of it. If the charge be true that more than a reasonable rate was secured by the combination, the excess over what was reasonable was an element of injury. *Texas & Pacific Ry. Co.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426, 436. The unreasonableness of the rate and to what extent unreasonable was submitted to the jury and the verdict represented their conclusion." 243 U. S., at 88.

245 U. S. 531, 533 (1918), and by Mr. Justice Brandeis in *Adams* v. *Mills*, 286 U. S. 397, 406–408 (1932). In those cases the possibility that plaintiffs had recouped the overcharges from their customers was held irrelevant in assessing damages.[8]

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[8] *Southern Pacific Co.* v. *Darnell-Taenzer Lumber Co.*, 245 U. S. 531 (1918), involved an action for reparations brought by shippers against a railroad. The shippers alleged exaction of an unreasonably high rate. To the claim that the shippers should not recover because they were able to pass on to their customers the damage they sustained by paying the charge, the Court said that the answer was not difficult:

"The general tendency of the law, in regard to damages at least, is not to go beyond the first step. As it does not attribute remote consequences to a defendant so it holds him liable if proximately the plaintiff has suffered a loss. The plaintiffs suffered losses to the amount of the verdict when they paid. Their claim accrued at once in the theory of the law and it does not inquire into later events. . . . The carrier ought not to be allowed to retain his illegal profit, and the only one who can take it from him is the one that alone was in relation with him, and from whom the carrier took the sum. . . . Probably in the end the public pays the damages in most cases of compensated torts." 245 U. S., at 533–534. *Adams* v. *Mills*, 286 U. S. 397 (1932), is to the same effect. See also *I. C. C.* v. *United States*, 289 U. S. 385 (1933).

*Keogh* v. *Chicago & N. W. Ry.*, 260 U. S. 156 (1922), is relied upon by United as stating a contrary rule. There the Court affirmed a judgment on the pleadings in a shipper's action under the antitrust laws charging a conspiracy among railroads to set unreasonably high rates. Because the rates had been approved as reasonable after a proceeding before the Interstate Commerce Commission, the shipper was held to have no cause of action under the antitrust laws. After giving this and other reasons for its judgment, the Court ended its opinion by saying that it would have been impossible for the shipper to have proved damages since no court could say that if the rate had been lower the shipper would have enjoyed the difference; the benefit might have gone to his customers. The Court, however, was careful to say earlier in its opinion that the result would have been different had the rate been unreasonably high, an approach confirmed by

United seeks to limit the general principle that the victim of an overcharge is damaged within the meaning of § 4 to the extent of that overcharge. The rule, United argues, should be subject to the defense that economic circumstances were such that the overcharged buyer could only charge his customers a higher price *because* the price to him was higher. It is argued that in such

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Mr. Justice Brandeis in *Adams* v. *Mills, supra.* We ascribe no general significance to the *Keogh* dictum for cases where the plaintiff is free to prove that he has been charged an illegally high price. It should also be noted that the Court, in speaking of the impossibility of proving damages, indicated no intention to preclude recovery in cases such as *Chattanooga Foundry* or *Thomson* v. *Cayser, supra.*

That is where the matter stood in this Court when the issue came to be pressed with some regularity in the lower federal courts in treble damage suits brought by customers of vendors who were charged with violating the Sherman Act by price fixing or monopolization. Some courts sustained the defense, both where the plaintiff complained of overcharging for materials or services used by him to produce his own product, *e. g., Wolfe* v. *National Lead Co.*, 225 F. 2d 427 (C. A. 9th Cir.), cert. denied, 350 U. S. 915 (1955), and where the price fixing concerned articles purchased for resale, *e. g., Miller Motors, Inc.*, v. *Ford Motor Co.*, 252 F. 2d 441 (C. A. 4th Cir. 1958); *Twin Ports Oil Co.* v. *Pure Oil Co.*, 119 F. 2d 747 (C. A. 8th Cir.), cert. denied, 314 U. S. 644 (1941). Others, beginning with Judge Goodrich's 1960 decision in the case before us, deemed it irrelevant that the plaintiff may have passed on the burden of the overcharge. Recently, for example, the defense was rejected in the cases brought against manufacturers of electrical equipment by local utilities who purchased equipment at unlawfully inflated prices and used it to produce electricity sold to the ultimate consumer. *E. g., Atlantic City Electric Co.* v. *General Electric Co.*, 226 F. Supp. 59 (D. C. S. D. N. Y.), interlocutory appeal refused, 337 F. 2d 844 (C. A. 2d Cir. 1964).

Concerning the passing-on defense generally, see Clark, The Treble Damage Bonanza: New Doctrines of Damages in Private Antitrust Suits, 52 Mich. L. Rev. 363 (1954); Pollock, Standing to Sue, Remoteness of Injury, and the Passing-On Doctrine, 32 A. B. A. Antitrust L. J. 5 (1966); Note, Private Treble Damage Antitrust Suits: Measure of Damages for Destruction of All or Part of a Business, 80 Harv. L. Rev. 1566, 1584–1586 (1967).

circumstances the buyer suffers no loss from the overcharge. This situation might be present, it is said, where the overcharge is imposed equally on all of a buyer's competitors and where the demand for the buyer's product is so inelastic that the buyer and his competitors could all increase their prices by the amount of the cost increase without suffering a consequent decline in sales.

We are not impressed with the argument that sound laws of economics require recognizing this defense. A wide range of factors influence a company's pricing policies. Normally the impact of a single change in the relevant conditions cannot be measured after the fact; indeed a businessman may be unable to state whether, had one fact been different (a single supply less expensive, general economic conditions more buoyant, or the labor market tighter, for example), he would have chosen a different price. Equally difficult to determine, in the real economic world rather than an economist's hypothetical model, is what effect a change in a company's price will have on its total sales. Finally, costs per unit for a different volume of total sales are hard to estimate. Even if it could be shown that the buyer raised his price in response to, and in the amount of, the overcharge and that his margin of profit and total sales had not thereafter declined, there would remain the nearly insuperable difficulty of demonstrating that the particular plaintiff could not or would not have raised his prices absent the overcharge or maintained the higher price had the overcharge been discontinued. Since establishing the applicability of the passing on defense would require a convincing showing of each of these virtually unascertainable figures, the task would normally prove insurmountable.[9] On the other hand, it is not

[9] The mere fact that a price rise followed an unlawful cost increase does not show that the sufferer of the cost increase was undamaged. His customers may have been ripe for his price rise earlier; if a cost

unlikely that if the existence of the defense is generally confirmed, antitrust defendants will frequently seek to establish its applicability. Treble damage actions would often require additional long and complicated proceedings involving massive evidence and complicated theories.

In addition, if buyers are subjected to the passing on defense, those who buy from them would also have to meet the challenge that they passed on the higher price to *their* customers. These ultimate consumers, in today's case the buyers of single pairs of shoes, would have only a tiny stake in a lawsuit and little interest in attempting a class action. In consequence, those who violate the antitrust laws by price fixing or monopolizing would retain the fruits of their illegality because no one was available who would bring suit against them. Treble damage actions, the importance of which the Court has many times emphasized, would be substantially reduced in effectiveness.

Our conclusion is that Hanover proved injury and the amount of its damages for the purposes of its treble damage suit when it proved that United had overcharged it during the damage period and showed the amount of the overcharge; United was not entitled to assert a passing on defense. We recognize that there might be situations—for instance, when an overcharged buyer has a pre-existing "cost-plus" contract, thus making it easy to prove that he has not been damaged—where the considerations requiring that the passing on defense not be

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rise is merely the occasion for a price increase a businessman could have imposed absent the rise in his costs, the fact that he was earlier not enjoying the benefits of the higher price should not permit the supplier who charges an unlawful price to take those benefits from him without being liable for damages. This statement merely recognizes the usual principle that the possessor of a right can recover for its unlawful deprivation whether or not he was previously exercising it.

permitted in this case would not be present. We also recognize that where no differential can be proved between the price unlawfully charged and some price that the seller was required by law to charge, establishing damages might require a showing of loss of profits to the buyer.[10]

III.

The District Court held that Hanover was entitled to damages for the period commencing July 1, 1939, and terminating September 21, 1955. The former date represented the greatest retrospective reach permitted under the applicable statute of limitations, and the latter date was that upon which Hanover filed its suit. In addition to somewhat shortening the forward reach of the damage period,[11] the Court of Appeals ruled that June 10, 1946, rather than July 1, 1939, marked the commencement of the damages period. June 10, 1946, was the date this Court decided *American Tobacco Co.* v. *United States*, 328 U. S. 781, which endorsed the views of the Court of Appeals for the Second Circuit in *United States* v. *Aluminum Co. of America*, 148 F. 2d 416 (1945). In the case before us the Court of Appeals concluded that

[10] Some courts appear to have treated price discrimination cases under the Robinson-Patman Act as in this category. See, *e. g.*, *American Can Co.* v. *Russellville Canning Co.*, 191 F. 2d 38 (C. A. 8th Cir. 1951); *American Can Co.* v. *Bruce's Juices*, 187 F. 2d 919, opinion modified, 190 F. 2d 73 (C. A. 5th Cir.), cert. dismissed, 342 U. S. 875 (1951).

[11] The Court of Appeals held that Hanover was entitled to damages only up to June 1, 1955, the date upon which Judge Wyzanski approved United's plan for terminating all outstanding leases and converting the lessee's rights to ownership. Because Hanover could have legally required United to convert from leasing to selling as of June 1, 1955, the Court of Appeals held it was not entitled to damages for United's failure to offer machines for sale after that date. This determination has not been challenged in this Court.

the decisions in *Alcoa-American Tobacco* fundamentally altered the law of monopolization—that prior to them it was necessary to prove the existence of predatory practices as well as monopoly power, whereas afterwards proof of predatory practices was not essential. The Court of Appeals was also of the view that because in prior litigation United's leases had escaped condemnation as predatory practices illegal under § 1, United's conduct should not be held to have violated § 2 at any time prior to June 10, 1946. 377 F. 2d, at 790. This holding has been challenged, and we reverse it.

The theory of the Court of Appeals seems to have been that when a party has significantly relied upon a clear and established doctrine, and the retrospective application of a newly declared doctrine would upset that justifiable reliance to his substantial injury, considerations of justice and fairness require that the new rule apply prospectively only. Pointing to recent decisions of this Court in the area of the criminal law, the Court of Appeals could see no reason why the considerations which had favored only prospective application in those cases should not be applied as well as in the civil area, especially in a treble damage action. There is, of course, no reason to confront this theory unless we have before us a situation in which there was a clearly declared judicial doctrine upon which United relied and under which its conduct was lawful, a doctrine which was overruled in favor of a new rule according to which conduct performed in reliance upon the old rule would have been unlawful. Because we do not believe that this case presents such a situation, we have no occasion to pass upon the theory of the Court of Appeals.

Neither the opinion in *Alcoa* nor the opinion in *American Tobacco* indicated that the issue involved was novel, that innovative principles were necessary to resolve it, or that the issue had been settled in prior cases in a manner

contrary to the view held by those courts. In ruling that it was not necessary to exclude competitors to be guilty of monopolization, the Court of Appeals for the Second Circuit relied upon a long line of cases in this Court stretching back to 1912. 148 F. 2d, at 429. The conclusion that actions which will show monopolization are not "limited to maneuvers not honestly industrial" was also premised on earlier opinions of this Court, particularly *United States* v. *Swift & Co.*, 286 U. S. 106, 116 (1932). In the *American Tobacco* case, this Court noted that the precise question before it had not been previously decided, 328 U. S., at 811, and gave no indication that it thought it was adopting a radically new interpretation of the Sherman Act. Like the Court of Appeals, this Court relied for its conclusion upon existing authorities.[12] These cases make it clear that there was no ac-

[12] Although the defendants in *American Tobacco* had been found guilty of conspiracy to restrain trade and of attempt and conspiracy to monopolize as well as of monopolization itself, the grant of certiorari was "limited to the question whether actual exclusion of competitors is necessary to the crime of monopolization under § 2 of the Sherman Act." 324 U. S. 836 (1945). After noting that "§§ 1 and 2 of the Sherman Act require proof of conspiracies which are reciprocally distinguishable from and independent of each other . . . ," 328 U. S., at 788, the Court determined that the jury could have found that the defendants had combined and conspired to monopolize, *id.*, at 797, and that it would be "only in conjunction with such a combination or conspiracy that these cases will constitute a precedent," *id.*, at 798. The Court stated that "[t]he *authorities* support the view that the material consideration in determining whether a monopoly exists is not that prices are raised and that competition actually is excluded but that power exists to raise prices or to exclude competition when it is desired to do so," 328 U. S., at 811 (emphasis added), and quoted with approval from *United States* v. *Patten*, 187 Fed. 664, 672 (Cir. Ct. 2d Cir. (1911), reversed on other grounds, 226 U. S. 525 (1913), that for there to be monopolization "[i]t is not necessary that the power thus obtained should be exercised. Its existence is sufficient." The Court also said:

"A correct interpretation of the statute *and of the authorities* makes it the crime of monopolizing, under § 2 of the Sherman Act, for

cepted interpretation of the Sherman Act which conditioned a finding of monopolization under § 2 upon a showing of predatory practices by the monopolist.[13]

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parties, as in these cases, to combine or conspire to acquire or maintain the power to exclude competitors from any part of the trade or commerce among the several states or with foreign nations, provided they also have such a power that they are able, as a group, to exclude actual or potential competition from the field and provided that they have the intent and purpose to exercise that power. See *United States* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150, 226, n. 59 and authorities cited.

"It is not the form of the combination or the particular means used but the result to be achieved that the statute condemns. It is not of importance whether the means used to accomplish the unlawful objective are in themselves lawful or unlawful." 328 U. S., at 809. (Emphasis added.)

The Court also welcomed the opportunity to endorse, 328 U. S., at 813–814, the following views of Chief Judge Hand in *Alcoa*, 148 F. 2d., at 431–432:

"[Alcoa] insists that it never excluded competitors; but we can think of no more effective exclusion than progressively to embrace each new opportunity as it opened, and to face every newcomer with new capacity already geared into a great organization, having the advantage of experience, trade connections and the elite of personnel. Only in case we interpret 'exclusion' as limited to manoeuvres not honestly industrial, but actuated solely by a desire to prevent competition, can such a course, indefatigably pursued, be deemed not 'exclusionary.' So to limit it would in our judgment emasculate the Act; would permit just such consolidations as it was designed to prevent.

. . . . . .

"In order to fall within § 2, the monopolist must have both the power to monopolize, and the intent to monopolize. To read the passage as demanding any 'specific' intent, makes nonsense of it, for no monopolist monopolizes unconscious of what he is doing."

[13] Any view of the earlier law of monopolization which would attempt, erroneously in our opinion, to find a requirement of predatory practices must rely heavily on certain dicta in *United States* v. *United States Steel Corp.*, 251 U. S. 417, 451 (1920) (Mr. Justice McKenna for a four-to-three Court), and *United States* v. *International Harvester Co.*, 274 U. S. 693, 708 (1927) (Mr. Justice

## IV.

Two questions are raised here about the manner in which damages were computed by the courts below. Hanover argues that the Court of Appeals erred in requiring the District Court, on remand, to take account of the additional taxes Hanover would have paid, had it purchased machines instead of renting them during the years in question. The Court of Appeals evidently felt that since only after-tax profits can be reinvested or distributed to shareholders, Hanover was damaged only to the extent of the after-tax profits that it failed to receive. The view of the Court of Appeals is sound in theory, but it overlooks the fact that in practice the Internal Revenue Service has taxed recoveries for tortious deprivation of profits at the time the recoveries are made, not by reopening the earlier years. See *Commissioner* v. *Glenshaw Glass Co.*, 348 U. S. 426 (1955). As Hanover points out, since it will be taxed when it recovers damages from United for both the actual and the trebled damages, to diminish the actual damages by the amount of the taxes that it would have paid had it received greater profits in the years it was damaged would be to apply a double deduction for taxation, leaving Hanover with less income than it would have had if United had not injured it. It is true that accounting for taxes in the year when damages are received rather than the year when profits were lost can change the amount of taxes the Revenue Service collects; as United shows, actual rates of taxation were much higher in some of the years when Hanover was injured than they are today. But because the statute of limitations frequently will bar the Commissioner from recomputing for earlier years, and

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the Sherman Act and which inflicted continuing and accumulating harm on Hanover. Although Hanover could have sued in 1912 for the injury then being inflicted, it was equally entitled to sue in 1955.

because of the policy underlying the statute of limitations—the fact that such recomputations are immensely difficult or impossible when a long period has intervened—the rough result of not taking account of taxes for the year of injury but then taxing recovery when received seems the most satisfactory outcome. The District Court therefore did not err on this question, and the Court of Appeals should not have required a recomputation.

United contends that if Hanover had bought machines instead of leasing them, it would have had to invest its own capital in the machines. United argues that the District Court erred in computing damages because it did not properly take account of the cost of capital to Hanover. The District Court found that in the years in question Hanover was able to borrow money for between 2% and 2.5% per annum, and that had Hanover bought machines it would have obtained the necessary capital by borrowing at about this rate. It therefore deducted an interest component of 2.5% from the profits it thought Hanover would have earned by purchasing machines. Our review of the record convinces us that the courts below did not err in these determinations; on the basis of the determinations of fact, Hanover's damages were properly computed.[16]

The judgment of the Court of Appeals is reversed, and the case remanded for further proceedings consistent with this opinion.

*It is so ordered.*

MR. JUSTICE MARSHALL took no part in the consideration or decision of this case.

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[16] United also says that because Hanover's managers would have computed their capital costs differently, they would not in fact have decided to stop leasing machines and to begin purchasing them. The District Court found, however, that Hanover, had it been given the opportunity, would have bought rather than leased the machines offered by United. This finding, affirmed by the Court of Appeals, is supported by the evidence, and we do not disturb it.

## APPENDIX TO OPINION OF THE COURT.

Excerpts From Judge Wyzanski's Opinion in *United States* v. *United Shoe Machinery Corp.*, 110 F. Supp. 295, 323–325 (D. Mass. 1953).

*Effects of the Leasing System.*

The effect of United's leasing system as it works in practice may be examined from the viewpoints of United, of the shoe manufacturers, and of competitors potential or actual.

For United these are the advantages. (a) United has enjoyed a greater stability of annual revenues than is customary among manufacturers of other capital goods. But this is not due exclusively to the practice of leasing as distinguished from selling. It is attributable to the effects of leasing when, as is the case with United, the lessor already has a predominant share of the market. (b) United has been able to conduct research activities more favorably than if it sold its machines outright. The leasing system, especially the service aspect of that system, has given United constant access to shoe manufacturers and their problems. This has promoted United's knowledge of their problems and has stimulated United's shoe machinery development. This research knowledge would not be diminished substantially if United's service activities covered fewer factories. But if all access to shoe factories were denied the diminution would be of great consequence to research. (c) The steadiness of revenues, attributable, as stated above, not to the leases alone, but to leases in a market dominated by the lessor, has tended to promote fairly steady appropriations to research. But these appropriations declined in the 1929 depression. Research expenditures might or might not be increased if competition were increased. The experi-

ence of United when faced with Compo's cement process suggests that declining revenues, no less than steady revenues, may promote research expenditures. (d) United has kept its leased machines in the best possible condition. (e) Under the leasing system United has enjoyed a wide distribution of machinery in a relatively narrow market. But this is merely another way of saying that United's market position, market power, lease provisions, and lease practices give it an advantage over competitors.

Upon shoe manufacturers, United's leasing system has had these effects. It has been easy for a person with modest capital and of something less than superior efficiency to become a shoe manufacturer. He can get machines without buying them; his machines are serviced without separate charges; he can conveniently exchange an older United model for a new United model; he can change from one process to another; and his costs of machinery per pair of shoes produced closely approximate the machinery costs of every other manufacturer using the same machinery to produce shoes by the same process. Largely as a consequence of these factors, there were in 1950, 1,300 factories each having a daily production capacity of 3,000 pairs a day or less; 100 factories each having a capacity of 3,000 to 8,000 pairs; and 40 larger manufacturers. Many of these larger manufacturers, who collectively account for 40% of the shoe production of the United States, started in a small way and flourished under United's leasing system. Moreover the testimony in this case indicates virtually no shoe manufacturers who are dissatisfied with the present system. It cannot be said whether this absence of expressed dissatisfaction is due to lack of actual dissatisfaction, to practical men's preference for what they regard as a fair system, even if it should be monopolistic, or to fear, inertia, or reluctance to testify.

However, while United's system has made it easier to enter the shoe manufacturing industry than to enter many, perhaps most, other manufacturing industries, it has not necessarily promoted in the shoe manufacturing field the goals of a competitive economy and an open society. Without attempting to make findings that are more precise than the evidence warrants, this much can be definitely stated. If United shoe machinery were available upon a sale basis, then—

(a) Some shoe manufacturers would be able to secure credit whether by conditional sales, chattel mortgages, or other devices.

(b) Under such a system, there is no reason to suppose that a purchaser's first installment on a machine would significantly exceed the deposit now often required of a new shoe manufacturer by United.

(c) A few shoe manufacturers would be able to borrow at rates of interest comparable to the interest rates at which United borrows, or raises capital.

(d) Some shoe manufacturers would be able to provide for themselves service at a cost less than the average cost to United of supplying service to all lessees of its machines.

(e) Those manufacturers who bought United machines would not be subject, as are those manufacturers who lease United machines, to the unilateral decision of United whether or not to continue or modify those informal policies which are not written in the leases and to which United is not expressly committed for any specific future period. While there is no evidence that United plans any change in its informal policies, and while United has not heretofore proceeded to alter its informal policies on the basis of its approval or disapproval of individual manufacturers, United has not expressly committed itself to continue, for example, its

1935 plan for return of machines, its right of deduction fund, its waiver for 4 months of unit charges, or its present high standard of service. United's reserved power with respect to these matters gives it some greater degree of psychological, and some greater degree of economic control, than a seller of machinery would have.

(f) Some manufacturers who had bought machinery would find that financial and psychological considerations made them more willing than lessees would be, to dispose of already acquired United machines and to take on competitors' machines in their place.

In looking at United's leasing system from the viewpoint of potential and actual competition, it must be confessed at the outset, that any system of selling or leasing one company's machines will, of course, impede to some extent the distribution of another company's machines. If a shoe manufacturer has already acquired one company's machinery either by outright purchase, by conditional purchase, or on lease on any terms whatsoever, the existence of that machine in the factory is a possible impediment to the marketing of a competitive machine.

Yet as already noted, a shoe manufacturer may psychologically or economically be more impeded by a leasing than by a selling system. And this general observation is buttressed by a study of features in the United leasing system which have a special deterrent effect. Though these features are stated separately, and some of them alone are important impediments, they must be appraised collectively to appreciate the full deterrent effect.

(a) The 10 year term is a long commitment.

(b) A shoe manufacturer who already has a United leased machine which can perform all the available work of a particular type may be reluctant to experiment with a competitive machine to the extent he would wish. He may hesitate to ask for permission to avoid the full capacity clause. If permission is given for an experimental

period he may find the experimental period too short. Thus a competitor may not get a chance to have his machine adequately tried out by a shoe manufacturer. If a shoe manufacturer prefers a competitive machine to a United machine on hand, he may not know the exact rate at which future payments may be commuted. If he knows, he may find that a fresh outlay to make those commuted payments (which admittedly are not solely for revenue but also are for protection against competition, and which admittedly discriminate in favor of a lessee who takes a new United machine and not a competitor's machine) plus the rentals he has already paid cost him more than if he had bought a similar machine in the first place and were now to dispose of it in trade or in a second-hand market. Thus for a maker of competitive machines he may be a less likely customer than if United had initially allowed him to buy the machine.

(c) United's lease system makes impossible a second-hand market in its own machines. This has two effects. It prevents United from suffering that kind of competition which a second-hand market offers. Also it prevents competitors from acquiring United machines with a view to copying such parts of the machines as are not patented, and with a view to experimenting with improvements without disclosing them to United.

(d) United's practice of rendering repair service only on its own machines and without separate charge has brought about a situation in which there are almost no large scale independent repair companies. Hence when a typical small shoe manufacturer is considering whether to acquire a complicated shoe machine, he must look to the manufacturer of that machine for repair service. And a competitor of United could not readily market such a complicated machine unless in addition to offering the machine he was prepared to supply service. As

the experience of foreign manufacturers indicates, this has proved to be a serious stumbling block to those who have sought to compete with United.

(e) If a shoe manufacturer is deciding whether to introduce competitive machines (either for new operations or as replacements for United machines on which the lease has not expired), he faces the effect of those decisions upon his credit under the Right of Deduction Fund. If he already has virtually all United machines, and if he replaces a few of them by competitive machines, the Fund will take care of substantially all his so-called deferred charges, and may cover some of his minimum payments. This is because credit to the Fund earned by a particular machine enures to the benefit of all leased machines in the factory, and the maximum advantage to the shoe manufacturer is to have a large number of United machines to which the credit can be applied. This advantage to the shoe manufacturer of acquiring and keeping a full line of United machines deters, though probably only mildly, the opportunities of a competing shoe manufacturer.

# SUPREME COURT OF THE UNITED STATES

Nos. 335 AND 463.—OCTOBER TERM, 1967.

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| The Hanover Shoe, Inc., Petitioner,<br>335 *v.*<br>United Shoe Machinery Corp.<br><br>United Shoe Machinery Corp., Petitioner,<br>463 *v.*<br>The Hanover Shoe, Inc. | On Writs of Certiorari to the United States Court of Appeals for the Third Circuit. |

[June 17, 1968.]

MR. JUSTICE STEWART, dissenting.

Hanover sued United under the Clayton Act for damages allegedly flowing from United's practice of offering its machines for lease but not for sale. Hanover did not attempt to prove as an original matter that this practice violated the antitrust laws. Instead, it relied exclusively upon § 5 (a) of the Clayton Act, which provides:

> "A final judgment or decree heretofore or hereafter rendered in any civil or criminal proceeding brought by or on behalf of the United States under the antitrust laws to the effect that a defendant has violated said laws shall be prima facie evidence against such defendant in any action or proceednig brought by any party against such defendant under said laws . . . as to all matters respecting which said judgment or decree would be an estoppel as between the parties thereto . . . ." 15 U. S. C. § 16 (a).

Hanover recovered an award of treble damages solely upon the theory that the 1953 judgment and decree in *United States* v. *United Shoe Machinery Corp.*, 110 F.

Supp. 295, aff'd *per curiam*, 347 U. S. 521, had established the unlawfulness of United's practice of making its machines available by lease only. So it follows, as the Court says, "[i]f the 1953 judgment is not prima facie evidence of the illegality of the practice from which Hanover's asserted injury arose, then Hanover, having offered no other evidence of illegality, should not have recovered at all." *Ante*, at —.

I think that the 1953 judgment did not have the broad effect the Court attributes to it today. On the contrary, that judgment, it seems evident to me, held unlawful only particular kinds of leases with particular provisions, not United's general practice of leasing only.[1]

The only precedent cited by the Court for its expansive application of § 5 (a) is *Emich Motors* v. *General Motors*, 340 U. S. 558. That case dealt with the estoppel effect of a general jury verdict in a criminal case. We deal here with a civil case which was tried to a federal judge, who rendered a thoroughly considered opinion and carefully precise decree.

One section of the decree, § 2, broadly set out what the court found United's antitrust violations to be:

> "Defendant violated § 2 of the Sherman Act, 15 U. S. C. A. § 2, by monopolizing the shoe machinery trade and commerce among the several States. Defendant violated the same section of the law by monopolizing that part of the interstate trade and commerce in tacks, nails, eyelets, grommets, and hooks, which is concerned with supplying the demand for those products by shoe factories within the United States. . . ." 110 F. Supp., at 352.

[1] I am not alone in this view. See *Cole* v. *Hughes Tool Co.*, 215 F. 2d 924, 932–933; *Laitram Corp.* v. *King Crab, Inc.*, 244 F. Supp. 9, 18. See also n. 2, *infra*.

Another section of the decree, § 4, clearly specified the unlawful means by which these antitrust violations had been accomplished, and United's general leasing practice was not one of those means:

> "All leases made by defendant which include either a ten-year term, or a full capacity clause, or deferred payment charges, and all leases under which during the life of the leases defendant has rendered repair and other service without making them subject to separate, segregated charges, are declared to have been means whereby defendant monopolized the shoe machinery market." *Ibid.*

In addition to these two sections setting forth the violations found, the decree contained some 20 remedial sections. Section 3 enjoined the violations found in § 2. Section 6 prohibited the particular types of leases found to be unlawful in § 4. Another section of the decree, § 5, went further and provided that in the future United's machines must be offered for sale as well as for lease. But it is a commonplace that "relief, to be effective, must go beyond the narrow limits of the proven violations." *United States* v. *Gypsum Co.*, 340 U. S. 76, 90. *United States* v. *Loew's, Inc.*, 371 U. S. 38, 53; *United States* v. *Bausch & Lomb Co.*, 321 U. S. 707, 724.

I can find nothing in Judge Wyzanski's written opinion in the 1953 case to suggest that he found United's lease-only practice, as such, to be a violation of the antitrust laws or illegal in any way.[2] To the contrary, that opin-

[2] Neither, apparently, could Judge Wyzanski. After the trial court in this action filed its opinion holding that the 1953 decree had condemned United's lease-only practice, United applied to Judge Wyzanski for a construction of his decree. While denying the application upon grounds of comity, Judge Wyzanski indicated a willingness to construe his decree if officially requested by the trial judge in the present case, Judge Sheridan. During the course of the hearing

ion repeatedly emphasized the anticompetitive effects of the particular types of leases held illegal, and carefully explained that the purpose of requiring that customers in the future be given an option to purchase was to create an eventual second-hand market in United's machines and to make the machines available to United's competitors, so that they might study and copy them. 110 F. Supp., at 349–350. The opinion specifically stated that the reason for ordering United to offer its machines for sale was *not* to widen the choices available to customers.[3]

The Court today adds as an Appendix to its opinion—like a *deus ex machina*—Judge Wyzanski's findings of fact. But it is irrelevant with respect to § 5 (a) that the 1953 findings describe United's lease-only practice, when neither the decree nor the opinion held that practice to be unlawful.

The real key to why the Court has gone astray in this case is to be found, I think, in the concluding sentence of Part I of the Court's opinion. For there the Court reveals that it is really not trying to determine what Judge Wyzanski decided in 1953, but is determining instead how this Court would decide the issues if the 1953 case were before it as an original matter today.[4]

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before Judge Wyzanski, he made his own views clear to government counsel:

"Now that you are here, are you not aware from being here on previous occasions that the government never contended, and I never ruled, as Judge Sheridan supposes the matter was decided?"

[3] 110 F. Supp., at 349–350. The language quoted by the Court, *ante*, at —, n. 3, is not a statement of why the District Court in 1953 ordered United to offer its machines for sale, but rather part of the court's answer to United's argument that it would be unfair to make United sell while its competitors continued only to lease. 110 F. Supp., at 350.

[4] "When the *applicable standard* for determining monopolization under § 2 *is applied to these facts*, it must be concluded that the District Court and the Court of Appeals did not err in holding that

In my view the 1953 *United Shoe* decision does not establish United's liability to Hanover. I do not reach, therefore, the other questions dealt with in the Court's opinion.

I would reverse the judgment of the Court of Appeals.

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United's practice of leasing and refusing to sell its major machines was determined to be illegal monopolization in the Government's case." (Emphasis added.)